IN THE SUPREME COURT OF THE UNITED STATES

October Term 1973

Misc. Number: 73-5772

ANTHONY PASQUALL FARETTA,

Petitioner,

versus

THE STATE OF CALIFORNIA,

Respondent.

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SUPREME COURT, U.S.

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MOTION FOR LEAVE TO FILE AND PROSECUTE ACTION WITHOUT THE PREPAYMENT OF FEES IN THIS COURT PURSUANT TO 28 U.S.C.A. 1915 (a)(d) and a PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE SECOND APPELLATE DISTRICT OF THE STATE OF CALIFORNIA (After a Denial of a Hearing by the Supreme Court of the State of California)

OOOoOOO

ANTHONY PASQUALL FARETTA, Petitioner
Central Training Facility
Post Office Box 686 - Central
Soledad, California, 93960

Petitioner appearing herein

Pro Se

SUPREME COURT OF THE UNITED STATES
October Term 1973

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Misc. Number: _____

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ANTHONY PASQUALL FARETTA,

Petitioner,

versus

THE STATE OF CALIFORNIA,

Respondent.

----------X

MOTION FOR LEAVE TO FILE AND PROSECUTE A PETITION FOR A WRIT OF CERTIORARI WITHOUT THE PREPAYMENT OF FILING FEES, COSTS OF PROSECUTION, OR COSTS OF PREPARATION OF THE RECORD BY PRINTING IN FORMA PAUPERIS AS ALLOWED BY SECTION 1915 TITLE 28 OF THE UNITED STATES CODE AS ANNOTATED

TO: THE HONORABLE WARREN E. BURGER, Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

ANTHONY PASQUALL FARETTA, the petitioner in a proposed petition for a writ of certiorari, which is attached hereto and incorporated as a portion hereof, respectfully asks that this Court enter its order allowing the said petition to be filed in this Court without the prepayment of filing fees, or the conditioning of prepayment for the costs of prosecution and/or of printing the record for filing in this Court; in forma pauperis as is allowed by the statutory authority of 28 U.S.C. 1915 (a) (d).

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The proposed action is a petition seeking a discretionary review in this Court of a decision as entered by the District Court of Appeal of the Second Appellate District of the State of California, after a petition for a hearing by the California Supreme C ourt was denied. The petition presents two issues of serious constitutional importance which appear, due to the variance of decisions relating thereto by the Courts of the Various States and of the United States appear to require appropriate determination by this Court. The issues presented by the petition specifically turn on the constitutional right of a defendant to represent himself pro se or in propria persona pursuant to the mandatory provisions of the sixth amendment of the C onstitution of the United States and if there was a deprival of due process of law when the defendant was not allowed to produce witnesses in his defense which disallowance depriving the petitioner of the fair trial that is contemplated by the due process and equal protection clauses of the fourteenth and the fifth amendments of the C onstitution of the United States.

Attached hereto and incorporated as a portion hereof the moving papers is the affidavit of this petitioner which indicates his inability to prepay the costs of filing of this action, prepay the costs of prosecution, or defray the costs of printing the record, and further that he does not have security which could be given in lieu of the said prepayment to condition the said filing herein.

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Further the affidavit indicates that the Petitioner is a peuper and a poor person.

Wherefore upon good cause being shown, it is respectfully submitted THAT there is sufficient basis for this court to enter its order allowing the commencement of this proposed petition in forma papueris. Upon that basis it is respectfully requested that such an order enter forthwith and that the Clerk be directed to file the petition as attached hereto and incorporated as a portion hereof, instanter without the prepayment of the said fees and costs as required under the rules of this Court.

DATED: October 15th, 1973 at the Central Training Facility of the California Department of Corrections, Soledad, California, 93960.

Respectfully submitted,

Anthony Pasquale Faretta

ANTHONY FARETTA, Petitioner
Appearing in Propria Persona & Pro Se

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DECLARATION AND AFFIDAVIT OF THE PETITIONER ANTHONY FARETTA IN SUPPORT OF THE MOTION TO COMMENCE THE ACTION AND PETITION FOR A WRIT OF CERTIORARI IN FORMA PAUPERIS, 28 U.S.C. 1915 (a) (d); WITHOUT PREPAYMENT OF FEES

STATE OF CALIFORNIA)
) ss.:
COUNTY OF MONTEREY)

I, the undersigned do hereinafter declare under the penalities of perjury as follows; but not limited thereto; in support of the motion for Leave to File and Commence a Petition for a Writ of Certiorari to the District Court of Appeal of the Second Appellate District of the State of California after denial of a hearing by the California Supreme court:

1. Declarant is the pro se petitioner in a petition for a writ of certiorari which is sought to be brought to this court from an adverse decision as entered by the District Court of Appeal of the Second Appellate District of the State of California, after a petition for a hearing was denied in the California Supreme C ourt;

2. Declarant brings this action in good faith, and on information and belief states that the issues as presented are important constitutional questions as well as questions which deal with the proper administration of criminal justicewithin the United States;

3. Your declarant brings this action within the properly established time limits for the taking of such an action in this Court;

4. Your declarant states that the nature of the

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proposed action is to specifically request that this court resolve the variances which appear in the various courts of the States and the United States with respect to the Sixth Amendment right of representation in propria persona in a criminal trial; and further the right to have a fair trial wherein the right to have witnesses appear in behalf of the defendant is not unpermissively curtailed in violation of the fifth and fourteenth amendment of the United States Constitutions proscriptions against denial of due process and equal protection under law;

5. Declarant is a poor person without funds, property and or other collateral with which the filing fees and the costs of prosecution of the proposed action could be given in lieu thereof said prepayment; further declarant has not transferred any property within the past year; declarant has not any intangible assets of any nature; and declarant is a pauper;

6. Further this declarant sayeth not.

Dated: October 15th, 1973 at the Central Training Facility, Soledad, California, 93960.

Anthony P. Faretta

ANTHONY PASQUALL FARETTA, Declarant

I, affirm under the penalities of perjury that I have read the contents of the foregoing declaration and know the contents thereof, and that the information as contained therein is true and correct to the best of my knowledge and belief as to those matters given on information and belief I state that I believe them to be true. Executed at the place as first written on October 15th, 1973.

ANTHONY PASQUALL FARETTA, Declarant

Anthony P. Faretta

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1973

ANTHONY PASQUALL FARETTA,

Petitioner,

versus

THE STATE OF CALIFORNIA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE SECOND APPELLATE DISTRICT OF CALIFORNIA (After a denial of a Hearing by the California Supreme Court)

ANTHONY PASQUALL FARETTA,
Petitioner
Central Training Facility
Post Office Box 686 - Central
Soledad, California, 93960

Petitioner appearing in

PROPRIA PERSONA AND PRO SE

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SUPREME COURT OF THE UNITED STATES
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ANTHONY PASQUALL FARETTA,

Petitioner,

versus

THE STATE OF CALIFORNIA,

Respondent.

----------X

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE SECOND APPELLATE DISTRICT OF THE STATE OF CALIFORNIA AFTER DENIAL OF A HEARING IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

TO: THE HONORABLE WARREN J. BURGER, Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

Petitioner, ANTHONY PASQUALL FARETTA, respectfully prays that a writ of certiorari issue to review a judgment and decision as entered by the District Court of Appeal of the Second Appellate District of California and after a petition for a hearing to the California Supreme Court has been denied.

PRELIMINARY STATEMENT

Petitioner is confined at the California Department of Corrections Central Training Facility at Soledad,

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California pursuant to a judgment as entered by the Superior Court of the State of California for the County of Los Angeles after a trial to a jury on a violation of section 487 sub-division three of the California Penal Code; Grand Theft; with three prior felony convictions found to be true.

At the trial and the proceedings prior to the trial the petitioner had been granted the right to represent himself in propria persona and to appear pro se (CT-3); however the propria persona and pro se representation was thereinafter revoked by the trial court and a member of the Los Angeles County Public Defender's Office was appointed to represent the appellant and petitioner over his protests. (CT-7)[1]

On Appeal to the District Court of Appeal of the Second Appellate District of the State of California the judgment as entered after the jury had found the defendant and petitioner here guilty was affirmed, on June 26, 1973, Petition for rehearing denied July 16, 1973.

On a Petition for a Hearing to the California Supreme Court, the court summarily denied a hearing without a written opinion, on August 22, 1973.

The facts of the trial indicate that a 1963 Cehvrolet was taken from a residence in Longe Beach, California and was later found in the possession of the petitioner when he was stopped for routine traffic violations by police

1. CT has reference to the Clerk's transcript which was prepared for the appeal in the Second Appellate District of California on first appeal below.

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officers of Compton, California, who determined that the automobile had been hotwired and that the license plates had been changed.

The petitioner testified that he had purchased the automobile from a thrid party named "Jerry" and that he had later switches license plates on the automobile with another recently purchased Chevrolet automobile which was similiar to the model found in his possession.

The jury found the defendant and petitioner here guilty of grand theft of the automobile.

OPINIONS BELOW

The opinion of the California Supreme Court denying a hearing is unpublished and a true copy of the same is attached to this petition as appendix exhibit "A".

The decision of the District Court of Appeal of the Second Appellate District of the State of California is unpublished, and a copy of the decision and opinion is attached hereto and incorporated as a portion hereof as appendix exhibit "B". The decision of the Court of Appeal, a written opinion, affirmed the judgment and sentence as imposed by the Superior Court of the State of California for the County of Los Angeles.

JURISDICTION OF THIS COURT

Jurisdiction of this court to grant a discretionary review in this instant matter is conferred upon this Court by the mandatory provisions of section 1257(3) of the United States Code as Annotated.

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QUESTIONS PRESENTED

I.

THE DECISION OF THE CALIFORNIA COURTS THAT A DEFENDANT DOES NOT HAVE THE ABSOLUTE RIGHT UNDER THE PROVISIONS OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION TO REPRESENT HIMSELF IN PROPRIA PERSONA OR TO APPEAR PRO SE IN A CRIMINAL LITIGATION IS CONTRARY TO THE SIXTH AMENDMENTS EXPRESSED PROTECTIONS AND THE REFUSAL OF THE CALIFORNIA COURTS TO ALLOW THE DEFENDANT TO APPEAR AND DEFEND IN PRO SE AFTER SUCH A REQUEST HAD BEEN MADE OFFENDS DUE PROCESS OF LAW.

II.

WILL DUE PROCESS OF LAW ALLOW THE STATE TO IMPERMISSIVELY PREVENT PRODUCTION OF FAVORABLE DEFENSE WITNESSES DURING A CRIMINAL PROSECUTION BY THE APPOINTMENT OF COUNSEL TO REPRESENT A DEFENDANT IN A CRIMINAL LITIGATION OVER HIS EXPRESS OBJECTION AND WHERE COUNSEL REFUSES TO BRING SAID WITNESS AS A DEFENSE WITNESS?

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REASONS FOR GRANTING THE WRIT

1. The decision of the Court below finding that the Petitioner had no constitutional right either federal or state to appear and defend in propria persona or pro se during the trial of the criminal matter appears to be at variance with the dictum of this Court as expressed in Adams v. United States, 317 U.S. 369 which appears to indicate that the right to appear pro se in a criminal litigation if a Sixth Amendment Right which would be made applicable to the States under the due process and equal protection clause of the fourteenth amendment of the United States Constitution. Regarding this question, the decision of People v. Sharp, 7 Cal. 3d 448 (1972) is the recognized authorityin the State of California with respect to the constitutional right to appear and defend in propria persona or pro se wherein it is expressly held that the right to counsel may not be demanded to be waived and further that a defendant in a criminal cause of action has neither the Federally or State of California Constitutional right to appear in propria persona or to defend in pro se. Sharp, supra, at p. 457.

There is considerable conflict regarding this question among the United States Courts that have determined it with the decision of the United States Court of Appeals for the Second and the Ninth Circuit recognizing and expressly holding that defendant's incriminal litgations have the absolute right to appear pro se. United States

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v. Plattner, (2nd. Cir. 1964) 330 F. 2d 271; Arnold v. United States, (9th Cir. 1969) 414 F. 2d 1056. Several other United States Circuit Courts appear to subscribe to the result and theory reached in this area by the Second Circuit's determination in Plattner, Id., supra. United States v. Sternman, (6th Cir. 1969) 415 F. 2d 1165, 1169-1170; Lowe v. United States, (7th Cir. 1969) 418 F. 2d 100, 103. However, by the same token, it is readily apparent that the Circuit Court of Appeals of the Tenth Circuit; Van Nattan v. United States, (10th Cir. 1966) 357 F. 2d 161, 163-164; Eighth Circuit; Butler v. United States, (8th Cir. 1963) 317 F. 2d 249, 258; The District of Columbia Circuit; Brown v. United States, (D.C. Cir. 1959) 264 F. 2d 363, 365. At least one other State Supreme Court, Montana has held that a defendant does not have the constitutional right to represent himself; In re the Petition of Reece, ___P. 2d ___, _____Mont. _____, 1965, which is in agreeance with the Circuit Courts determinations of this question.

It is admittedly a question of first impression in this Court as this Court has never spoken directly to the Sixth Amendment's strictures in this regard. As this is an important question of first impression, as it has any number of constitutional realities, and where resolution is important to the proper administration of criminal justice to promote a uniform decision with respect to this question the writ should be granted.

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2. The failure of court-appointed counsel and likewise the trial court in allowing a witness who had been riding in the automobile with the petitioner at the time of the arrest, who had material testimony relative to the criminal matter to be brought forward at the trial, and the decision of the court below appears to be at a direct variance with the decisions of this Court that expressly hold that a defendant in a criminal litigation and trial is entitled to a fair trial; Powell v. Alabama, (1932) 287 U.S. 45; and is at variance with previous expressions of this Court providing dictum support for the fair trial theory of constitutional law in the area of witness production during the trial; Smith v. Illinois, (1968) 390 U.S. 129; Brookhart v. Janis, (1966) 384 U.S. 1 and further appears to be at variance with the Supreme Court of the State of Missouri; State v. Berkley, 92 Mo. 41 (48 .S.W. 24 quoting inter alia and relying upon the opinion of Chief Justice Marshal of the United States Supreme Court in 1 Burr's Trial 178, 179.

There was a recognizable conflict between the petitioner and counsel, and prior to the trial when the petitioner was appearing pro se and in propria persona he had requested issuance of process to have the witness brought to the trial and therein to appear as a defense witness. The resolution of this question by the Court below indicates disregard for the right to a fair trial, and presents a serious questions as to the impart of the constitutional

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right to a fair trial which is a necessary portion of the due process and equal protection clause of the fourteenth amendment making such a right applicable to the various states.

Such an important question turning as it does upon the right to a fair trial, and the production of witnesses being frustrated by the refusal of the trial court to allow the defendant; petitioner here; to represent himself in propria persona, and where there is a clear showing on the record that counsel as forced upon the petitioner failed to adhere to the request of the defendant that the Court be requested to make a diligent inquiry as to the whereabouts of this vital witness; would appear to require appropriate resolution by this court, to establish firmly delinated guidlines in this important area of the proper administration of criminal justice.

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ARGUMENT

I. THE STATES ARE CONSTITUTIONALLY REQUIRED TO ALLOW DEFENDANTS IN CRIMINAL LITIGATIONS AND TRIALS TO REPRESENT THEMSELF APPEARING IN PROPRIA PERSONA OR PRO SE UNDER THE TRADITIONAL CONCEPTS OF THE MANDATE OF THE SIXTH AMENDMENT AND THE DUE PROCESS AND EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

It is clear that the petitioner here at the time of the commencement of the criminal proceedings was intially allowed to represent himself in propria persona and to appear before the bar of the Court pro se. The superior court thereafter, albeit another judge of the court, revoked the propria persona status of the petitioner, and forced counsel upon the petitioner over his expressed objections. Such appointment of counsel, over expressed objection by a defendant in a criminal trial, and California decisional law; e.g. People v. Sharp, (1972) 7 Cal. 3d 457; which expressly holds that the right to appear in propria persona and appear before the court pro se is not a federal or state constitutional right, offends not only due process of law, but likewise flies into the very face of the pertiant provisions of the Sixth Amendment to the Constitution of the United States, which expressly provides the right to the assistance of 'counsel' but which does not "force counsel upon a defendant." Adams v. United States (1942) 317 U.S. 269, at p. 279.

The question of first impression is without a court in over two hundred years has

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never passed directly on this question, perhaps being that the issue has never squarely presented itself, as it is submitted is the present posture of this case; and where where it is readily apparent that there is considerable divergence in determination of this question by each of the Courts that have had occasion to pass upon such a claim, (See e.g. Self-Representation in Criminal Trials; The Dilemma of the Pro Se Defendant, 59 California Law Review 1479,) it is felt that; and it is so submitted; that this court should pass upon the merits of such a question and resolve the same for the proper adminsitration of criminal kustice in the United States.

The Courts of the State of California have fashioned various procedural devices, which ante dated the decision in Sharp, Id., supra, in an effort to curtail what the California Attorney General had termed as a mence to the Courts, the propria persona defendant. See e.g. People v. Floyd, 1 Cal. 3d 694 (1970); People v. Glasser, (1968) 265 Cal. App. 2d 849. Indeed, it is clear that the voters and the general public of the State of California only recently voted to amend the Constitution of the State of California; wherein Article One section 13 of the California State Constitution was amended to take effect on June 6, 1972 to state as a necessary portion thereof that the "Legislature shall have the power to require the defendant in a felony case to have the assistance of counsel." see e.g. section 13, Article One California State Constitution

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as amended June 6, 1972, compare also the provisions of California Penal Code sections 686, 859 and 987 and a new enactment section 686.1 which provide that in special cases in the State of California an accused defendant must be represented by counsel at all stages of the preliminary and pretrial as well as trial portions of the criminal litigation.

Conversly thus it appears then, that the question which is before this Court turns on two important considerations namely will the decisional law in California as indicates that the right to appear in propria persona and litigate before the bar in a criminal litigation pro se is not a federally consitutionally protected right, and likewise will the provisions of a State Constitution which expressly forbids self-representation and appearance in propria persona or pro se of a defendant in a criminal litigation, survive the test of the apparently federally mandated constitutional provisions of the sixth amendment which appears to expressly provide that a defendant may appear without counsel in propria persona or pro se in a criminal litigation and trial. On the rationale approach to constitutional sanction it is submitted that neither rationale as reached in California will withstand the intent of the frmers of the constitution when they, as a necessary portion of a fair trial and in inherently framing the command of the sixth amendment made very clear that such a right is so fundamental that no court should be called

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upon to determine the extent of the right. On this basis it is submitted that the right to appear and defend in person is such an important right that any curtailment of that right is fundamentally lacking in concern for the proper objective tests of due process of law; Carter v. Illinois, (1946) 329 U.S. 173; and equally if allowed to stand would sanction clear eroding of constitutional principals which cannot be allowed as a matter of law. Compare Carter v. Illinois, supra with the result reached by the United States Court of Appeal for the Second Circuit in United States v. Plattner, (2nd Cir. 1964) 330 F. 2d 271.[2/]

Here as in Carter v. Illinois, Id. supra, there is no showing that the petitioner ever waived his right to appear in propria persona and further the record expressly indicates that the petitioner at no time ever waived his right to appear by his own person; and indeed the record is very clear in this regard that petitioner objected to the Superior Court forcing counsel upon him. In this regard the Court below indicates at pages 3-4 of their opinion that:

> "The court initially granted Faretta's motion to represent himself. During the pretrial proceedings, however, the court concluded that Faretta had not intelligently waived his right to be represented by counsel, and appointed counsel to represent him at the trial. Faretta"

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"contends the court erred.

We find no error. Faretta had no constitutional right to represent himself. (People v. Sharp, 7 Cal. 3d 448, 458-460.) And we cannot say that the trial court abused its discretion in concluding that Faretta had not made a knowing and intelligent waiver of his right to be represented by counsel. (People v. Floyd, 1 Cal. 3d 694, 702-705.) Despite his desire to be his own attorney, Faretta did not appear to be aware of the possible consequences of waiving the opportunity for skilled and experieinced representation at trial." (Opinion cited supra, EMPHASIS ADDED)

Thus it is clear that the subjective test applied in resolution of this issue in the Court below, turned upon a limitation of "ones right" to conduct "one's own defense in propria persona," United States v. Plattner, supra at p. 274, and further that the California Courts have read into the right to counsel which attached to all state court proceedings with this Court's determination of Gideon v. Waigmwright, (1963) 372 U.S. 335 a requirement that counsel be appointed notwithstanding any desires of the defendant to appear in propria persona. In other words, California is in effect stating that Counsel must be given

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2. The Plattner, case supra, appears to have been distinguished somewhat in United States v. Abbamonte, (2nd Cir. 1965) 348 F. 2d 700; however it is submitted that it did not overrule Plattner in any sense of the means.

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to all criminal defendants, and that the criminal defendants must accept counsel, whether they desire counsel or not. Indeed, the California Supreme Court in Sharp, supra focused on this particular aspect of California decisional law when they likened the right to appear and defend in person, although admittedly a constitutional right, to be a conditional constitutional right which could only be waived upon the consent of the trial court. See Sharp, supra, at p. 455 where counsel waiver is likened to Jury waiver as determined by this Court in Singer v. United States, (1965) 380 U.S. 24. Such a holding flies into the face of the very holdings of this court which indicate that at that sixth amendment does guarantee "assistance of counsel" however it does not "force a lawyer upon a defendant," Adams, Id., supra at p. 279, and ignores totally the very plain fact that counsel was not provided to all criminal defendants as a matter of right in the United States for over two hundred and fifty years prior to the advent of Gideon, Id., supra.

To allow the holding of this Court in Gideon, Id. supra, to dilute the right to appear and defend in person it is submitted does violence and in some sort of sense perverts the entire impart of the very clearly expressed intent of the Sixth Amendment, and upon this basis it is clear that while counsel is sometimes admittedly a clear need, on the facts of this cause, revocation of the propria persona status and refusing to allow the petitioner

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to defend in his own proper person encrouched upon the substantial rights of this petitioner, and no matter how the court's below attempt to justify the same, as a matter of clear constitutional sanction this petitioner has been sperived of the full measure of what the framers of the constitution intended was to be his to hold when the Sixth amendment was made a portion of the Bill of Rights to the C onstitution of the United States.

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II. THE CURTAILMENT OF WITNESS PRODUCTION OCCASIONED BY THE TRIAL COURTS' REFUSAL TO ALLOW THE PETITIONER TO REPRESENT HIMSELF, VIOLATED DUE PROCESS OF LAW IN THAT COUNSEL WOULD NOT IN CONJUNCTION WITH THE TRIAL COURT PRODUCE THE WITNESS HENCE PETITIONER WAS DEPRIVED OF THE FAIR TRIAL THAT DUE PROCESS OF LAW CONTEMPLATES.

The Court below indicated in their decision that the claim of the Petitioner that he was denied the production of certain defense witnesses was "spurious." Likewise the court indicated that the counsel as assigned to the defendant did not call as a witness the one "Charles Cunningham" who the petitioner desired as a witness as he was in the automobile at the time of the petitioners' arrest on traffic violations. (Slip opinion of Court of Appeal, op. cit., supra, at page 6)

The court then went onto to provide the support for the consideration of this claim, which is presented in this Court, quoting from the testimony of the Defendant as given during the trial in defense. (Op. cit., supra, at pp. 7) The relevant portion of that testimony was indicated as follows:

"Q. Have you made any efforts to find him?

A. Previous to a competency hearing and my subsequent termination, you know, of defendant's representative for defendants, I had subpoenaed Charles Cunningham to the County for an interview, and I called his mother several times." (EMPHASIS ADDED)

The competency hearing referenced, supra, was the

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trial court's determination that the defendant had not made an intelligent waiver of counsel, and where the propris persona status of the petitioner was terminated prior the the trial. It was at this stage of the proceedings that counsel was appointed to represent the petitioner in the California Superior Court.

The testimony there is very revealing in two respects as deals with the question which is presently before the court here for determination. First it indicated that when defendant was acting as his own attorney, that he had already issued a subpoena for the attendance of the witness and the testimony further reveals that he had asked counsel as appointed by the Court "I ask (defense counsel) to endeavor to contact him" so that the witness would be available as a witness. The record further reveals that such request was neither honored and further that the trial court apparent quashed the issued subpeona of the petitioner, which subpeona had been issued when the petitioner was counsel of record in this matter.

It appears that the fundamental rights that are concerned here, is first the right to a fair trial and secondly the opportunity to present witnesses in one's defense. Both areas are constitutionally advanced and proper contentions when the aspects of due process are taken into consideration here. Indeed, the action of the trial court in appointing counsel, as discussed above appeared to be error per se, and further the quashingof process for the

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STD. 113 (NEW 8-70)

appearance of the defendant's witness, who had been under subpeona when petitioner had been appearing in propria persona coupled with the refusal of counsel to reserve the witness, assuredly deprived the petitioner of the fair trial that constitutional sanction contemplates. For a court to be allowed to exclude evidence of an essential element of the defense or to preclude the calling of a material witness, constitutes a denial of due process of law, and indeed there is California authority that so holds. (Compare: e.g. In re Harris, 56 Cal. 2d 879 with People v. Wilson, 179 Cal. App. 2d 821, where due process sanctions appear to be discussed in context with the procedure which was employed in this cause of action.)

Indeed, it has been held that it is error for a court to require a defendant to submit his case to the jury without the presence of his witnesses and the benefit of their oral testimony and further it is apparent that the right of an "accused person to the process of the court to compel the attendance of witnesses seems to following, necessarily, from the right to examine those witnesses; and whereever the right exists, it would be reasonable that it should be accompanied by means of rendering if effectual." (See e.g. State v. Berkley, 92 Mo. 41; (48 S.W. 24) quoting inter alia, Chief Justice Marshal from 1 Burr's Trials 178, at p. 179.

The constitutional right to securement of defense witnesses is a constitutional right of the first strata

COURT PAPER
STATE OF CALIFORNIA
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and "no want of prejudice would cure it." Smith v. Illinois, (1968) 390 U.S. 129, 131, quoting inter alia from Brookhart v. Janis, (1966) 384 U.S. 1, 3.

The implications here are readily apparent and fully delinated above, because had the petitioner been counsel and appearing in propria persona, then this question would never have presented itself, as the witness would have been available and would have been utilized.

The important remification of constitutional application of procedural due process of law given in context controls the determination of this question, and as this is a very important question concerning the proper application and administration of criminal justice it is requested that this court make an appropriate determination of this question and resolve it firmly establishing guidelines for further and future utilization by the Courts to eliminate the inherent prejudice in such situations as presented upon the particular factual situation of this case.

xxxxx

xxxxx

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xxxxx

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STATE OF CALIFORNIA
STD. 113 (NEW 8-70)

CONCLUSION

Premised upon the clearly presented and pertiant constitutional questions of this petition it is respectfully submitted that this is a proper case for the exercise of this Court's discretion in granting appropriate review, and making firmly delinated resolutions of the questions that have been presented.

DATED: October 15, 1973, at the Central Training Facility, Soledad, California, 93960.

Respectfully submitted,

Anthony P. Faretta

ANTHONY PASQUALL FARETTA,

Petitioner appearing Pro Se

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STATE OF CALIFORNIA
STD. 113 (NEW 8-70)

APPENDIX TO PETITION

COURT PAPER
STATE OF CALIFORNIA
STD. 113 (NEW 8-70)
46843-790 8-70 300M 1T O&P

UNAVAILABLE

APPENDIX EXHIBIT "A"

STATE OF CALIFORNIA }
COUNTY OF MONTEREY } ss.:

I, the undersigned do hereinafter declare under the penalities of perjury, that the exhibit hereinafter is a true copy of the order received by this undersigned from the Clerk of the Supreme Court of the State of California with regard to a petition for a hearing as taken from a decision as entered by the District Court of Appeal of the Second Appellate District of California. Executed on this 15th DAY OF OCTOBER, 1973, at the CALIFORNIA DEPARTMENT OF CORRECTIONS FACILITY, CENTRAL TRAINING FACILITY, SOLEDAD, COUNTY OF MONTEREY, STATE OF CALIFORNIA, 93960.

Anthony P. Faretta

ANTHONY PASQUALI FARETTA, Declarant

COURT PAPER
STATE OF CALIFORNIA
STD. 113 (NEW 8-70)
46842-750 8-70 200M 17 OBP

APPENDIX EXHIBIT "B"

STATE OF CALIFORNIA)
) ss.:
COUNTY OF MONTEREY)

I, the undersigned do hereinafter declare under the penalities of perjury, that the hereinafter styled exhibit is an exact true copy of the decision as sent to me by the Clerk of the District Court of Appeal of the Second Appellate District of the State of California, when a decision was entered in first appeal; and further that the same reflects the action of the court. EXECUTED ON THIS 15th DAY OF OCTOBER, 1973, AT THE CALIFORNIA DEPARTMENT OF CO* RRECTIONS CENTRAL TRAINING FACILITY, SOLEDAD, COUNTY OF MONTEREY, STATE OF CALIFORNIA, 93960.

Anthony P. Paretta

ANTHONY PASQUALE PARETTA, Declarant

COURT PAPER
STATE OF CALIFORNIA
STD. 113 (NEW 8-70)
46842-750 8-70 200M IT OSP

The original of this copy was of photographically poor quality.

NOT FOR PUBLICATION.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
v.
ANTHONY PASQUALL PARETTA,
Defendant and Appellant.

2D CRIM. NO. 2272
(Sup.Ct.No. A 012 665)

Filed
June 26, 1973
JH

APPEAL from judgment of the Superior Court of Los Angeles County. Carroll M. Dur .a, Judge. Affirmed.

Norman W. De Carteret, Esq., under appointment by the Court of Appeal, for Appellant.

Evelle J. Younger, Attorney General, Edward A. Hinz, Jr., Chief Assistant Attorney General -- Criminal Division, William E. James, Assistant Attorney General -- Appeals Section, Howard J. Schwab and Donald J. Caser, Deputy Attorneys General, for Respondent.

[illegible] appeals the judgment [illegible] rendered upon the jury's verdict finding him guilty of grand theft. (Pen. Code, § 487, subd. 3.)

FACTS

Dean Telford's 1963 Chevrolet Nova was stolen from the street in front of his home in Long Beach between 7:00 p.m. on 21 May 1972 and 6:00 a.m. on 22 May 1972. At 6:00 a.m. on 22 May 1972 Compton Police Officer Edwards stopped defendant Faretta for a traffic violation. Faretta was driving Telford's Nova. The Nova was "hotwired" and the license plates had been changed. Faretta told Edwards he purchased the Nova from "Bubby" two or three days before. Faretta showed Edwards keys he said belonged to the car, but the keys did not work the Nova's locks.

After his arrest, Faretta telephoned the managers of the hotel where he lived and asked them to remove a tapedeck and pink slip (certificate of automobile ownership) from his room and to place the pink slip to show that Faretta owned the car. The tapedeck and pink slip were in the Nova when it was stolen. The managers gave the tapedeck and pink slip to the police. An investigating officer found another 1963 Chevrolet Nova without license plates parked a block from Faretta's hotel.

Faretta testified on the defense that he bought

Telford's Nova from "Jerry" on the evening of 21 May 1972 and switched license plates from another Nova he owned to the newly-purchased one. While in jail awaiting trial, Faretta attempted to pass a note to another prisoner: "Jerry . . . I've been down since May 21, on a GTA. I told them when I got busted I bought the car from a guy named Jerry. . . . If you sold me the car on the 20th of May, 1972 about 10:00 p.m. please confide in my attorney and we'll try to get around in the court. . . ."

ISSUES

Faretta contends (1) the court should have permitted him to represent himself; (2) there was no probable cause for his arrest; (3) the pink slip was illegally seized by an agent of the police; (4) he was denied his right to produce witnesses; (5) the prosecutor's question concerning a prior consistent statement was prejudicial misconduct; and (6) the court should have instructed the jury concerning the limited use of evidence of prior offenses.

DISCUSSION

1. Representation.

The court initially granted Faretta's motion to represent himself. During pretrial proceedings, however, the court concluded that Faretta had not intelligently waived his right to be represented by counsel, and appointed

counsel to represent him at trial. Faretta contends the court erred.

We find no error. Faretta had no constitutional right to represent himself. (People v. Sharp, 7 Cal.3d 448, 459-460.) And we cannot say that the trial court abused its discretion in concluding that Faretta had not made a knowing and intelligent waiver of his right to be represented by counsel. (People v. Floyd, 1 Cal.3d 694, 702-705.) Despite his desire to be his own attorney, Faretta did not appear aware of the possible consequences of waiving the opportunity for skilled and experienced representation at trial.

Smith v. Superior Court, 68 Cal.2d 547, relied on by Faretta, is not in point. Smith involved the right of the trial court to replace a court-appointed attorney based on the court's subjective belief that the attorney was not competent to handle the case. The defendant's understanding of the consequences of retaining the attorney was not in issue.

2. The Arrest.

Faretta contends there was no probable cause for his arrest and therefore that the car he was driving was illegally seized.

We need not consider this contention because Faretta did not object on this ground at trial. (People

v. Flores, 63 Cal.2d 563, 567.) Moreover, Faretta improperly relies on statements in an arrest report not part of the record on appeal. (People v. Gordon, 71 Cal.2d 843, 849.) In any event, Officer Edwards testified that when he stopped Faretta for a traffic violation, Faretta stated he did not have a driver's license and did not know where the registration for the Nova was. Edwards saw that the Nova had been hotwired. Faretta gave Edwards an automobile registration slip that listed the license plates on the Nova but a different vehicle registration number. Edwards ran a check on the vehicle registration number of the Nova, and learned that the Nova should have had a different set of license plates. These facts amply justified Faretta's arrest for theft of the Nova.

3. The Pink Slip.

Faretta contends the police obtained the pink slip by an illegal search and seizure. He argues that the hotel manager who found the pink slip in Faretta's hotel room and gave it to the police was acting as an agent of the police.

Faretta testified that he asked the hotel managers to find the pink slip and give it to the police. The hotel managers testified that Faretta asked them to find the pink slip and alter it. The investigating police officer testified that one of the hotel managers told him she was going to look for the pink slip and asked if the

officer wanted to be present; he waited outside Faretta's hotel room door until the manager located the pink slip.

The contention is without merit. If Faretta asked the managers to find the pink slip and give it to the police, then he consented to the search. If Faretta asked the managers to find the slip and alter it, he may not complain if the managers violated his confidence and gave the slip to the police. (See Hoffa v. United States, 385 U.S. 293, 300-303.) And if the investigating officer merely stood by while the hotel manager carried out her own search, we cannot say that the police were so involved in the planning and execution of the search as to render the hotel manager an agent of the police. (See Raymond v. Superior Court, 19 Cal.App.3d 321, 325-326.)

4. Right to Produce Witnesses.

Faretta contends he was denied the right to produce witnesses because his counsel did not call as a witness Charles Cunningham, the passenger with Faretta in the Nova when he was arrested.

The contention is spurious. Faretta did not present this claim at trial. He made no showing that Cunningham would have given relevant testimony. (See People v. Vatelli, 15 Cal.App.3d 54, 58-59.) And Faretta's own testimony proves that Cunningham could not be located:

"Q You have maintained contact with that gentleman since you have been incarcerated; isn't that

[illegible] Charles Cunningham? Q Yes. A No. His mother is very interested in knowing where he is at. I have maintained contact with her. Q You don't know where Charles is? A I don't. Q Have you made any efforts to find him? A Previous to a competency hearing and my subsequent termination, you know, of defendant's representative for defendants, I had subpoenaed Charles Cunningham to the County for an interview, and I called his mother several times. I have tried to contact him, and I asked [defense counsel] to endeavor to contact him, and all this has proved fruitless.'

3. Prosecutorial Misconduct.

Faretta testified that after his arrest he called the hotel managers and told them to find the pink slip and give it to the police. On cross-examination the prosecutor asked Faretta why he did not tell that to the district attorney before trial. The court sustained an objection to that question, denied a motion for mistrial, and admonished the jury to disregard the question.

The prosecutor erred in questioning Faretta about his failure to make exculpatory statements before trial. (People v. Rogers, 220 Cal.App.2d 143, 146.) However, in light of the overwhelming evidence of guilt, the court's specific prompt admonition to the jury to disregard the question, and the court's general instruction to the jury that questions are not evidence, we are

convinced beyond a reasonable doubt that the error was harmless. (People v. Crawford, 253 Cal.App.2d 524, 536; Chapman v. California, 386 U.S. 18, 24.)

5. Limited Use of Prior Offenses.

The information alleged that Faretta had four prior felony convictions. Faretta denied the allegations. The prosecution presented evidence to prove the prior convictions, and the jury found the allegations to be true. Faretta contends the court should have limited the extent of the prosecution's evidence to prove the prior convictions and should have instructed the jury that the evidence could not be considered proof of Faretta's criminal propensities.

This contention, too, is without merit. Because Faretta did not object to admission of evidence to prove the prior convictions, we need not consider the contention on appeal. (People v. Johnson, 5 Cal.App.3d 851, 863.) Moreover, the prosecution is not limited to any particular type of evidence to prove prior convictions. (People v. Hill, 67 Cal.2d 105, 127.) In any event, the limited use of evidence of prior convictions was adequately explained to the jury in this instruction:

". . .

"In this case, you must first decide the question of whether defendant is guilty of the offense charged and your consideration of that question must not be

influenced by the allegation of the alleged prior conviction[s].

"If you find the defendant not guilty as to the offense charged, it will not be necessary to determine whether the allegation[s] of the prior conviction[s] [are] true. . . ."

The judgment is affirmed.

NOT FOR PUBLICATION.

FLEMING, J.

We concur:

ROTH, P.J.

COMPTON, J.

Supreme Court, U. S.
FILED
AUG 2 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

No. 73-5772

ANTHONY PASQUALL FARETTA, *Petitioner*,

—v.—

CALIFORNIA

ON WRIT OF C[illegible] IE COURT OF APPEAL OF
CALIFO[illegible] APPELLATE DISTRICT

PETITION FOR CERTIORARI FILED NOVEMBER 17, 1973
CERTIORARI GRANTED MARCH 18, 1974

Supreme Court of the United States

No. 73-5772

ANTHONY PASQUALL FARETTA, *Petitioner,*

—v.—

CALIFORNIA

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

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SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. A-012485

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

v.

ANTHONY PASQUALL FARETTA, DEFENDANT

INFORMATION

GRAND THEFT (Sec. 487, Subd. 3, P.C.)

The said ANTHONY PASQUALL FARETTA is accused by the District Attorney of and for the County of Los Angeles, State of California, by this information, of the crime of GRAND THEFT, in violation of Section 487, Subdivision 3, Penal Code, a felony, committed as follows: That the said ANTHONY PASQUALL FARETTA between May 21, 1972, and May 22, 1972, at and in the County of Los Angeles, State of California, did willfully, unlawfully and feloniously take a certain motor vehicle, to wit, an automobile, then and there the personal property of Dean H. Telford.

JOSEPH P. BUSCH
District Attorney
for the County of Los Angeles,
State of California

By /s/ Ted Sten
TED STEN
Deputy

[Filed in open Superior Court of the State of California, County of Los Angeles, on motion of the District Attorney of said County. Dated: June 21, 1972, William G. Sharp, Clerk, By I. M. Ayers, Deputy]

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. A 012485

PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

v.

ANTHONY PASQUALL FARETTA, DEFENDANT

AMENDMENT TO INFORMATION

4 PRIOR CONVICTION(S)

That before the commission of the offense hereinbefore set forth in this information, said defendant, ANTHONY PASQUALL FARETTA, under the name of Lawrence Ricchio, was on or about the 10th day of June, 1965, in the Superior Court of the State of California, for the County of Los Angeles, convicted of the crime of VIOLATION OF SECTION 459, Penal Code, 2 counts, a felony. (SC# 304935)

That before the commission of the offense hereinbefore set forth in this information, said defendant, ANTHONY PASQUALL FARETTA, under the name of Lawrence E. Ricchio, was on or about the 30th day of November, 1965, in the Superior Court of the State of California, for the County of Los Angeles, convicted of the crime of VIOLATION OF SECTION 11530, Health and Safety Code, a felony. (SC# 309489)

That before the commission of the offense hereinbefore set forth in this information, said defendant, ANTHONY PASQUALL FARETTA, under the name of Anthony P. Faretta, was on or about the 5th day of May, 1967, in the Superior Court of the State of California, for the County of Orange, convicted of the crime of VIOLATION OF SECTION 11530, Health and Safety Code, a felony.

That before the commission of the offense hereinbefore set forth in this information, said defendant, ANTHONY PASQUALL FARETTA, under the name of Anthony P. Faretta, was in the Superior Court of the State of California, for the County of Los Angeles, convicted of the crimes of VIOLATION OF SECTIONS 487.3, Penal Code, and 10851, Vehicle Code, felonies, and the judgment of said court against said defendant in said connection was on or about the 25th day of March, 1970, pronounced and rendered. (SC# A006595)

TR 8-2-72 "J"

7/27sk

[Filed Aug. 2, 1972, William G. Sharp, County Clerk, By S. F. Perkiss, Deputy]

DEPT.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES SGJ

Date: JUNE 21 1972 — HONORABLE ~~CHARGLL P DUNKUM~~ ~~B SUTTER~~ — JUDGE — Deputy Sheriff: J. Lemon — Deputy Clerk: J. M. Cuevas — Reporter: ~~S F PERKISS~~ ~~S UCREA~~ — (Parties and counsel checked if present)

~~102~~ /102

CASE NO. A 401245

PEOPLE OF THE STATE OF CALIFORNIA
VS
C1 FARETTA ANTHONY PASQUALL

CHARGE: 487.3 C1C1S

Counsel for Plaintiff: JOSEPH P. BUSCH JR., DISTRICT ATTY. By R. Berger DEPUTY

Counsel for Defendant: ~~P. A. Gest, Jr.~~ A. Lieman P.D.

NATURE OF PROCEEDINGS ~~AT. CT~~

1 ☐ _____ SWORN TO INTERPRET _____

2 ☐ DEFENDANT IS ADVISED OF HIS **CONSTITUTIONAL RIGHTS.**

3 ☒ PUBLIC DEFENDER IS APPOINTED ☐ ARRAIGNMENT/PLEA CONTINUED TO _____ AT _____ A.M. IN THIS DEPARTMENT.

4 ☐ ON MOTION OF DEFENDANT PUBLIC DEFENDER RELIEVED. _____ SUBSTITUTED AS ATTORNEY OF RECORD FOR DEFENDANT.

5 ☐ **DUE TO CONFLICT OF INTERESTS,** PUBLIC DEFENDER RELIEVED. PURSUANT TO SECT. 987.2 PENAL CODE _____ APPOINTED TO REPRESENT DEFENDANT.

6 ☐ DEFENDANT'S MOTION TO APPEAR IN PROPRIA PERSONNA GRANTED/DENIED.

7 ☐ ON DEFENDANT'S MOTION, ARRAIGNMENT/PLEA CONTINUED TO _____ FOR _____

8 ☐ **ARRAIGNED.** DEFENDANT'S MOTION UNDER SECT 995 & 1538.5 PENAL CODE SET IN DEPT _____ **ON** _____ AT _____ A.M.

9 ☐ MOTION UNDER 995 & 1538.5 PENAL CODE GRANTED/DENIED.

10 ☒ ARRAIGNED. **PLEADS NOT GUILTY. ADMITS/DENIES PRIORS.**

11 ☐ ARRAIGNED. PLEADS NOT GUILTY AND **NOT GUILTY BY REASON OF INSANITY.** DRS. _____ AND _____ APPOINTED UNDER SECT 1027 PENAL CODE.

12 ☐ ON DEFENDANT'S MOTION, PURSUANT SECT 730 EVIDENCE CODE, DR _____ AND DR _____ APPOINTED TO EXAMINE DEFENDANT/AND TO PREPARE CONFIDENTIAL REPORT FOR DEFENDANT UNDER SECT 1017 EVIDENCE CODE.

13 ☒ **TRIAL**/MOTION ~~1538.5 PENAL CODE~~/SET ON 2-2-72 IN DEPT 30 J AT 9:00 A.M.

14 ☐ DEFENDANT PERSONALLY AND ALL COUNSEL **WAIVE TRIAL BY JURY.** COURT ACCEPTS WAIVER.

15 ☐ DEFENDANT PERSONALLY AND ALL COUNSEL **WAIVE TIME FOR TRIAL.**

16 ☐ ON MOTION OF THE PEOPLE AMENDED INFORMATION/INDICTMENT FILED ALLEGING _____ PRIORS.

17 ☐ REARRAIGNED. DEFENDANT ADMITS/DENIES PRIORS.

18 ☐ ON PEOPLE'S MOTION, INFORMATION/INDICTMENT AMENDED BY INTERLINEATION TO SHOW **TRUE NAME** AS _____ CHARGED AS _____

19 ☐ DEFENDANT PERSONALLY **WITHDRAWS PLEA** OF NOT GUILTY.

20 ☐ ARRAIGNED. PLEADS GUILTY/NOLO CONTENDERE, WITH CONSENT OF DISTRICT ATTORNEY AND APPROVAL OF COURT, AS CHARGED TO COUNTS _____ DEFENDANT WAIVES TIME FOR SENTENCE. REFERRED TO PROBATION DEPARTMENT. FURTHER PROCEEDINGS. DISPOSITION OF COUNTS _____ ISSUE OF TRUTH OR FALSITY OF PRIORS. CONTINUED TO _____ IN DEPT _____ AT _____ A.M.

21 ☐ DEFENDANT WAIVES PROBATION REFERRAL **REQUESTS IMMEDIATE SENTENCE.** (SEE SENTENCE BELOW/SEE ATTACHED SHEET)

22 ☐ DEFENDANT FAILS TO APPEAR **BAIL FORFEITED/O.R. REVOKED.** BENCH WARRANT ISSUED. NO BAIL/BAIL FIXED IN SUM OF $_____ PLUS PENALTY ASSESSMENT.

23 ☐ BENCH WARRANT **ORDERED HELD** TO _____

24 ☐ DEFENDANT APPEARING, BENCH WARRANT ORDERED RECALLED/QUASHED. ORDER OF _____ FORFEITING BAIL VACATED. BAIL REINSTATED UPON FILING OF REASSUMPTION AND PAYMENT OF $_____ COSTS WITHIN _____ DAYS.

25 ☒ DEFENDANT'S MOTION FOR **REDUCTION OF BAIL** IS ~~GRANTED~~/DENIED. ~~BAIL SET AT $_____~~ PLUS PENALTY ASSESSMENT.

26 ☐ DEFENDANT'S MOTION FOR RELEASE ON **OWN RECOGNIZANCE** GRANTED/DENIED.

27 ☐ DEFENDANT'S MOTION TO BE REINSTATED ON BAIL/OWN RECOGNIZANCE GRANTED/DENIED.

28 ☐ **FURTHER ORDER** AS FOLLOWS:

Atty to Retain to represent himself in Pro Per
Set for hearing 6-22-72, 9am SOJ

ENTERED
WILLIAM G. SHARP, County Clerk

29 ☐ RELEASED ON OWN RECOGNIZANCE 30 ☐ BAIL 31 ☒ REMANDED 32 ☐ DISCHARGED
33 ☐ BAIL EXONERATED 34 ☐ RELEASED

DEPT. SoJ

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Date: June 22, 1972 ~~1971~~
HONORABLE ~~BEACH VASEY~~ Edmund D. Brain JUDGE
~~C WENDELL~~ J. Jones Deputy Sheriff

~~SOE~~ , Deputy Clerk
B SCHAUWECKER J. M. Reyes , Reporter
M. J. Mesina (Parties and counsel checked if present)

904

A012485
PEOPLE OF THE STATE OF CALIFORNIA
VS
01 FARETTA ANTHONY PASQUALL

Counsel for Plaintiff: EVELLE J. YOUNGER, DISTRICT ATTY.
Counsel for Defendant: By R. Berger DEPUTY
A LIEMAN PD
Pro Per

CHARGE
487.3 01 Ct

NATURE OF PROCEEDINGS Defts Petn to represent himself in Pro Per

1 ☐ _____ SWORN TO INTERPRET.
2 ☐ DEFENDANT IS ADVISED OF HIS CONSTITUTIONAL RIGHTS.
3 ☐ PUBLIC DEFENDER IS APPOINTED. ☐ ARRAIGNED AND PLEA CONTINUED TO _____ AT _____ A.M. IN THIS DEPARTMENT.
4 ☒ ON MOTION OF DEFENDANT PUBLIC DEFENDER RELIEVED, _____ SUBSTITUTED AS ATTORNEY OF RECORD FOR DEFENDANT.
5 ☐ DUE TO CONFLICT OF INTERESTS, PUBLIC DEFENDER RELIEVED UNDER SECT. 987A PENAL CODE _____ APPOINTED TO REPRESENT DEFENDANT.
6 ☒ DEFENDANT'S MOTION TO APPEAR IN PROPRIA PERSONNA GRANTED/~~DENIED~~.

7 ☐ ON DEFENDANT'S MOTION, ARRAIGNMENT/PLEA CONTINUED TO _____ FOR _____
8 ☐ ARRAIGNED. DEFENDANT'S MOTION UNDER SECT 995 & 1538.5 PENAL CODE SET IN DEPT. _____ ON _____ AT _____ A.M.
9 ☐ MOTION UNDER 995 & 1538.5 PENAL CODE GRANTED/DENIED.
10 ☐ ARRAIGNED. PLEADS NOT GUILTY. ADMITS/DENIES PRIORS.
11 ☐ ARRAIGNED. PLEADS NOT GUILTY AND NOT GUILTY BY REASON OF INSANITY. DRS. _____ AND _____ APPOINTED UNDER SECT 1027 PENAL CODE.

12 ☐ ON DEFENDANT'S MOTION, UNDER SECT 730 EVIDENCE CODE, DR. _____ AND DR. _____ APPOINTED TO EXAMINE DEFENDANT/AND TO PREPARE CONFIDENTIAL REPORT FOR DEFENDANT UNDER SECT 1017 PENAL CODE.
13 ☐ TRIAL/MOTION 1538.5 PENAL CODE/SET ON _____ IN DEPT. _____ AT _____ A.M.
14 ☐ DEFENDANT PERSONALLY AND ALL COUNSEL WAIVE TRIAL BY JURY. COURT ACCEPTS WAIVER.
15 ☐ DEFENDANT PERSONALLY AND ALL COUNSEL WAIVE TIME FOR TRIAL.

16 ☐ ON MOTION OF THE PEOPLE AMENDED INFORMATION/INDICTMENT FILED ALLEGING _____ PRIORS.
17 ☐ REARRAIGNED. DEFENDANT ADMITS/DENIES PRIORS.
18 ☐ ON PEOPLE'S MOTION, INFORMATION/INDICTMENT AMENDED BY INTERLINEATION TO SHOW TRUE NAME AS _____ CHARGED AS _____.
19 ☐ DEFENDANT PERSONALLY WITHDRAWS PLEA OF NOT GUILTY.

20 ☐ ARRAIGNED. PLEADS GUILTY/NOLO CONTENDERE, WITH CONSENT OF DISTRICT ATTORNEY AND APPROVAL OF COURT, AS CHARGED TO COUNTS _____. DEFENDANT WAIVES TIME FOR SENTENCE. REFERRED TO PROBATION DEPARTMENT. FURTHER PROCEEDINGS, DISPOSITION OF COUNTS _____, ISSUE OF TRUTH OR FALSITY OF PRIORS, CONTINUED TO _____ IN DEPT. _____ AT _____ A.M.
21 ☐ DEFENDANT WAIVES PROBATION REFERRAL. REQUESTS IMMEDIATE SENTENCE. (SEE SENTENCE BELOW/SEE ATTACHED SHEET)

22 ☐ DEFENDANT FAILS TO APPEAR. BAIL FORFEITED/O.R. REVOKED. BENCH WARRANT ISSUED. NO BAIL/BAIL FIXED IN SUM OF $_____ PLUS PENALTY ASSESSMENT.
23 ☐ BENCH WARRANT ORDERED HELD TO _____
24 ☐ DEFENDANT APPEARING, BENCH WARRANT ORDERED RECALLED/QUASHED. ORDER OF _____ FORFEITING BAIL VACATED, BAIL REINSTATED UPON FILING OF REASSUMPTION AND PAYMENT OF $_____ COSTS WITHIN _____ DAYS.

25 ☒ DEFENDANT'S MOTION FOR REDUCTION OF BAIL IS ~~GRANTED~~/DENIED. ~~BAIL SET AT $~~ _____ PLUS PENALTY ASSESSMENT.
26 ☐ DEFENDANT'S MOTION FOR RELEASE ON OWN RECOGNIZANCE GRANTED/DENIED.
27 ☐ DEFENDANT'S MOTION TO BE REINSTATED ON BAIL/OWN RECOGNIZANCE GRANTED/DENIED.
28 ☒ FURTHER ORDER AS FOLLOWS:

The Court inquires of the Deft as to his ability to represent himself in this case and the matter is submitted.
Later: Court finds Deft has the ability to represent himself and grants the Petition. Deft is required to notice all motions 10 days in advance of hearing and serve a copy on the District Attorney. Deft advised that all Pre-Trial motions must be noticed for hearing at least 10 days prior to trial.
Petition filed. Deft granted full Pro Per privileges.

29 ☐ RELEASED ON OWN RECOGNIZANCE 30 ☐ BAIL 31 ☒ REMANDED 32 ☐ BAIL EXONERATED
33 ☐ RELEASED

T6C777-1/70

CR

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES **DEPT.** SoJ

Date: June 29 1972 HONORABLE: ~~GARROLL H DUNNUF~~ Lowell M. Bias JUDGE ~~L FIKE~~ J. Senn Deputy Sheriff

~~S E PERKISS~~ L. M. Argue ~~S BOREN~~ V. Meuser Deputy Clerk, Reporter (Boxes checked if present)

CASE NO. A012485

PEOPLE OF THE STATE OF CALIFORNIA VS

Counsel for Plaintiff: JOSEPH P. BUSCH, JR., DISTRICT ATTY. BY R Berger DEPUTY

Counsel for Defendant: PRO PER

01 FARETTA ANTHONY PASQUALL

CHARGE: 487,3 01 Ct

NATURE OF PROCEEDINGS: TRIAL, Advanced from 8-2-72 (BOX CHECKED IF ORDER APPLICABLE)

67 ☐ ..... SWORN TO INTERPRET.....

68 ☐ BY STIPULATION OF DEFENDANT AND ALL COUNSEL, MOTION UNDER SECT. 1538.5 PENAL CODE IS SUBMITTED ON THE TESTIMONY CONTAINED IN THE TRANSCRIPT OF THE PROCEEDINGS HAD AT THE P- IMINARY HEARING, SUBJECT TO THIS COURT'S RULINGS, WITH EACH SIDE RESERVING THE RIGHT TO OFFER ADDITIONA' /IDENCE AND ALL STIPULATIONS ENTERED INTO AT THE PRELIMINARY HEARING BE DEEMED ENTERED INTO IN THESE PROCEEDINGS. IT IS FURTHER STIPULATED THAT ALL EXHIBITS RECEIVED AT THE PRELIMINARY HEARING ARE DEEMED RECEIVED IN EVIDENCE IN THESE PROCEEDINGS, SUBJECT TO THIS COURT'S RULINGS. THE DEFENDANT PERSONALLY WAIVES HIS RIGHT TO CONFRONTATION OF WITNESSES FOR THE PURPOSE OF FURTHER CROSS-EXAMINATION.

69 ☐ THE COURT STATES IT HAS READ AND CONSIDERED THE TRANSCRIPT OF THE PRELIMINARY HEARING. ..... SWORN AND TESTIF..... FOR THE PEOPLE ..... SWORN AND TESTIF..... FOR THE DEFENDANT.

70 ☐ FOLLOWING EXHIBITS ADMITTED INTO EVIDENCE: .....

71 ☐ MOTION OF DEFENDANT UNDER SECT 995 & 1538.5 PENAL CODE GRANTED/DENIED/CONTINUED TO .....

72 ☐ ON COURT'S OWN MOTION, DUE TO CONGESTED CALENDAR, CAUSE **TRAILED/CONTINUED** TO ..... AT..... A.M.

73 ☐ ON MOTION OF PEOPLE/DEFENDANT TRIAL IS CONTINUED TO ..... AT..... AM FOR/TO .....

74 ☐ FOLLOWING WITNESSES INSTRUCTED TO RETURN ON ABOVE DATE WITHOUT FURTHER ORDER, NOTICE OR SUBPOENA .....

75 ☐ THE DEFENDANT PERSONALLY AND ALL COUNSEL **WAIVE TRIAL BY JURY/TIME FOR TRIAL.**

76 ☐ ON MOTION OF THE PEOPLE, AMENDED INFORMATION/INDICTMENT FILED ALLEGING..... PRIORS.

77 ☐ **REARRAIGNED.** DEFENDANT ADMITS DENIES PRIORS.

78 ☐ ON MOTION OF THE PEOPLE, INFORMATION/INDICTMENT AMENDED BY INTERLINEATION TO SHOW .....

79 ☐ ON MOTION OF THE PEOPLE, CASE NO. ..... CONSOLIDATED WITH CASE NO. ..... AS COUNTS ..... THEREOF.

80 ☐ DEFENDANT PERSONALLY **WITHDRAWS PLEA** OF NOT GUILTY AS TO COUNTS ....., IS **REARRAIGNED** AND PLEADS GUILTY NOLO CONTENDERE (WITH THE CONSENT OF THE DISTRICT ATTORNEY AND THE COURT) AS CHARGED TO..... ☐ A LESSER AND NECESSARILY INCLUDED OFFENSE.

81 ☐ DEFENDANT FAILS TO APPEAR. **BAIL FORFEITED/O.R. REVOKED.** BENCH WARRANT ISSUED. NO BAIL BAIL FIXED IN THE SUM OF $ ..... PLUS PENALTY ASSESSMENT.

82 ☐ BENCH WARRANT **ORDERED HELD** UNTIL .....

83 ☐ DEFENDANT APPEARING, BENCH WARRANT ORDERED RECALLED QUASHED. ORDER OF ..... FORFEITING BAIL VACATED AND BAIL REINSTATED ON FILING REASSUMPTION AND PAYMENT OF $..... COSTS BEFORE.....

84 ☐ CAUSE CALLED FOR **TRIAL.**

85 ☐ BY STIPULATION OF DEFENDANT AND ALL COUNSEL, CAUSE IS SUBMITTED ON THE TESTIMONY CONTAINED IN THE TRANSCRIPT OF THE PROCEEDINGS HAD AT THE PRELIMINARY HEARING SUBJECT TO THIS COURT'S RULINGS, WITH EACH SIDE RESERVING THE RIGHT TO OFFER ADDITIONAL EVIDENCE, AND ALL STIPULATIONS ENTERED INTO AT THE PRELIMINARY HEARING BE DEEMED ENTERED INTO IN THESE PROCEEDINGS. IT IS FURTHER STIPULATED THAT ALL EXHIBITS RECEIVED AT THE PRELIMINARY HEARING ARE DEEMED RECEIVED IN EVIDENCE IN THESE PROCEEDINGS, SUBJECT TO THIS COURT'S RULINGS. THE DEFENDANT PERSONALLY WAIVES HIS RIGHT TO CONFRONTATION OF WITNESSES FOR THE PURPOSE OF FURTHER CROSS-EXAMINATION.

86 ☐ THE COURT STATES IT HAS READ AND CONSIDERED THE TRANSCRIPT OF THE PRELIMINARY HEARING.

87 ☐ .....

88 ☐ ..... SWORN AND TESTIF..... FOR THE PEOPLE.

89 ☐ FOLLOWING EXHIBITS ADMITTED INTO EVIDENCE: ..... SWORN AND TESTIF..... FOR THE DEFENDANT.

90 ☐ THE COURT FINDS THE DEFENDANT NOT GUILTY ..... GUILTY AS CHARGED TO ..... ☐ A LESSER AND NECESSARILY INCLUDED OFFENSE.

91 ☐ DEFENDANT WAIVES TIME FOR SENTENCE. REFERRED TO PROBATION DEPARTMENT AND FURTHER PROCEEDINGS, DISPOSITION OF COUNTS ..... DETERMINATION OF PRIORS AND DEGREE CONTINUED TO ..... IN DEPT ..... AT ..... AM.

92 ☐ DEFENDANT WAIVES PROBATION REFERRAL. **REQUESTS IMMEDIATE SENTENCE.** SENTENCED AS SHOWN BELOW ON ATTACHED SHEET.

93 ☒ **FURTHER ORDER** AS FOLLOWS:

Cause advanced to this date for the purpose of deft conferring with the District Attorney. Deft makes oral motion and Court advises deft to present written, noticed motions. Trial date of 8-2-72 to stand.

THIS MINUTE ORDER WAS ENTERED June 29 1972 WILLIAM G. SHARP, COUNTY CLERK

94 ☐ RELEASED ON OWN RECOGNIZANCE 95 ☐ BAIL 96 ☒ REMANDED 97 ☐ BAIL EXONERATED 98 ☐ RELEASED

76C770-12/70

9

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES **DEPT.** SO J

Date: JULY 6 1972 ELSWORTH M BEAM

HONORABLE: CAHOON/M/DURHAM JUDGE / V/FAVE Deputy Sheriff | S/M/PEARNELL I M AYERS , Deputy Clerk / S/MCKEAN (NONE) , Reporter

(Parties and counsel checked if present)

CASE NO. A012485

PEOPLE OF THE STATE OF CALIFORNIA VS 01 FARETTA ANTHONY PASQUALL

Counsel for Plaintiff: JOSEPH P. BUSCH, JR., DISTRICT ATTY. BY DEPUTY

Counsel for Defendant: IN PROPRIA PERSONA

CHARGE: 487.3 01 Ct

NATURE OF PROCEEDINGS: ExParte request to interview witness /held in County Jail (BOX CHECKED IF ORDER APPLICABLE)

67 ☐ ..... SWORN TO INTERPRET.....

68 ☐ BY STIPULATION OF DEFENDANT AND ALL COUNSEL, MOTION UNDER SECT. 1538.5 PENAL CODE IS SUBMITTED ON THE TESTIMONY CONTAINED IN THE TRANSCRIPT OF THE PROCEEDINGS HAD AT THE PRELIMINARY HEARING, SUBJECT TO THIS COURT'S RULINGS, WITH EACH SIDE RESERVING THE RIGHT TO OFFER ADDITIONAL EVIDENCE AND ALL STIPULATIONS ENTERED INTO AT THE PRELIMINARY HEARING BE DEEMED ENTERED INTO IN THESE PROCEEDINGS. IT IS FURTHER STIPULATED THAT ALL EXHIBITS RECEIVED AT THE PRELIMINARY HEARING ARE DEEMED RECEIVED IN EVIDENCE IN THESE PROCEEDINGS, SUBJECT TO THIS COURT'S RULINGS. THE DEFENDANT PERSONALLY WAIVES HIS RIGHT TO CONFRONTATION OF WITNESSES FOR THE PURPOSE OF FURTHER CROSS-EXAMINATION.

69 ☐ THE COURT STATES IT HAS READ AND CONSIDERED THE TRANSCRIPT OF THE PRELIMINARY HEARING. ..... SWORN AND TESTIF..... FOR THE PEOPLE

70 ☐ FOLLOWING EXHIBITS ADMITTED INTO EVIDENCE: ..... SWORN AND TESTIF..... FOR THE DEFENDANT.

71 ☐ MOTION OF DEFENDANT UNDER SECT 995 & 1538.5 PENAL CODE GRANTED / DENIED / CONTINUED TO .....

72 ☐ ON COURT'S OWN MOTION, DUE TO CONGESTED CALENDAR, CAUSE TRAILED / CONTINUED TO..... AT..... A.M.

73 ☐ ON MOTION OF PEOPLE / DEFENDANT TRIAL IS CONTINUED TO..... AT..... AM FOR / TO .....

74 ☐ FOLLOWING WITNESSES INSTRUCTED TO RETURN ON ABOVE DATE WITHOUT FURTHER ORDER, NOTICE OR SUBPOENA: .....

75 ☐ THE DEFENDANT PERSONALLY AND ALL COUNSEL WAIVE TRIAL BY JURY / TIME FOR TRIAL.

76 ☐ ON MOTION OF THE PEOPLE, AMENDED INFORMATION / INDICTMENT FILED ALLEGING..... PRIORS.

77 ☐ REARRAIGNED. DEFENDANT ADMITS / DENIES PRIORS.

78 ☐ ON MOTION OF THE PEOPLE, INFORMATION / INDICTMENT AMENDED BY INTERLINEATION TO SHOW .....

79 ☐ ON MOTION OF THE PEOPLE, CASE NO. ..... CONSOLIDATED WITH CASE NO. ..... AS COUNTS ..... THEREOF.

80 ☐ DEFENDANT PERSONALLY WITHDRAWS PLEA OF NOT GUILTY AS TO COUNTS ....., IS REARRAIGNED AND PLEADS GUILTY, NOLO CONTENDERE (WITH THE CONSENT OF THE DISTRICT ATTORNEY AND THE COURT) AS CHARGED TO..... ☐ A LESSER AND NECESSARILY INCLUDED OFFENSE.

81 ☐ DEFENDANT FAILS TO APPEAR. BAIL FORFEITED / O.R. REVOKED. BENCH WARRANT ISSUED. NO BAIL / BAIL FIXED IN THE SUM OF $..... PLUS PENALTY ASSESSMENT.

82 ☐ BENCH WARRANT ORDERED HELD UNTIL .....

83 ☐ DEFENDANT APPEARING, BENCH WARRANT ORDERED RECALLED / QUASHED. ORDER OF ..... FORFEITING BAIL VACATED AND BAIL REINSTATED ON FILING REASSUMPTION AND PAYMENT OF $..... COSTS BEFORE .....

84 ☐ CAUSE CALLED FOR TRIAL.

85 ☐ BY STIPULATION OF DEFENDANT AND ALL COUNSEL, CAUSE IS SUBMITTED ON THE TESTIMONY CONTAINED IN THE TRANSCRIPT OF THE PROCEEDINGS HAD AT THE PRELIMINARY HEARING, SUBJECT TO THIS COURT'S RULINGS, WITH EACH SIDE RESERVING THE RIGHT TO OFFER ADDITIONAL EVIDENCE, AND ALL STIPULATIONS ENTERED INTO AT THE PRELIMINARY HEARING BE DEEMED ENTERED INTO IN THESE PROCEEDINGS. IT IS FURTHER STIPULATED THAT ALL EXHIBITS RECEIVED AT THE PRELIMINARY HEARING ARE DEEMED RECEIVED IN EVIDENCE IN THESE PROCEEDINGS, SUBJECT TO THIS COURT'S RULINGS. THE DEFENDANT PERSONALLY WAIVES HIS RIGHT TO CONFRONTATION OF WITNESSES FOR THE PURPOSE OF FURTHER CROSS-EXAMINATION.

86 ☐ THE COURT STATES IT HAS READ AND CONSIDERED THE TRANSCRIPT OF THE PRELIMINARY HEARING.

87 ☐ .....

88 ☐ ..... SWORN AND TESTIF..... FOR THE PEOPLE.

89 ☐ FOLLOWING EXHIBITS ADMITTED INTO EVIDENCE: ..... SWORN AND TESTIF..... FOR THE DEFENDANT.

90 ☐ THE COURT FINDS THE DEFENDANT NOT GUILTY ..... GUILTY AS CHARGED TO ☐ A LESSER AND NECESSARILY INCLUDED OFFENSE.

91 ☐ DEFENDANT WAIVES TIME FOR SENTENCE. REFERRED TO PROBATION DEPARTMENT AND FURTHER PROCEEDINGS, DISPOSITION OF COUNTS ....., DETERMINATION OF PRIORS AND DEGREE CONTINUED TO ..... IN DEPT ..... AT ..... AM.

92 ☐ DEFENDANT WAIVES PROBATION REFERRAL. REQUESTS IMMEDIATE SENTENCE. SENTENCED AS SHOWN BELOW / ON ATTACHED SHEET.

93 ☒ FURTHER ORDER AS FOLLOWS:

Defts request for interview of witness is granted.

The Sheriff's Dept is ordered to transport Charles Ray Kinningham, Booking #2019396, Wayside Honor Rancho, to Central Jail on July 14 1972, for the purpose of interview by this deft.

Copy of above order delivered to Sheriff's Dept this date.

A copy of this order is sent to Deft by U.S. Mail on this date ~~xxxxxxxx~~ addressed as follows: Anthony Paswuall Faretta, 1992-490 2500, 441 Bauchet Street, Los Angeles, Ca 90012.

THIS MINUTE ORDER WAS ENTERED 7-6-72 WILLIAM G. SHARP, COUNTY CLERK

94 ☐ RELEASED ON OWN RECOGNIZANCE 95 ☐ BAIL 96 ☐ REMANDED 97 ☐ BAIL EXONERATED
98 ☐ RELEASED

76C770-12/70

4 MISC.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Date: July 13, 1972 — DEPT. SoJ
HONORABLE: Edward M. Ream — JUDGE: A. M. Ayers — Deputy Clerk
Deputy Sheriff: J. Senn — Reporter: V. Mirda

CASE NO. A 012485 (Parties and counsel checked if present)

PEOPLE OF THE STATE OF CALIFORNIA
VS

Counsel for People: Joseph P Busch Jr District Atty
DEPUTY DISTRICT ATTY: George Zegarnick

Counsel for Defendant: Pro Per
Arnold Fleman, PD

01 Faretta, Anthony Pasquale

CHARGE: 487.3 o/c

MINUTES ENTERED: 7-13-72

NATURE OF PROCEEDINGS: Review of Pro Per Status (BOX CHECKED IF ORDER APPLICABLE)

101 ☐
102 ☒ PUBLIC DEFENDER APPOINTED ~~OPD~~ ~~BEING PRESENT~~
103 ☐ ON MOTION OF DEFENDANT ~~RELIEVED~~ AND ~~IS SUBSTITUTED AS ATTORNEY OF RECORD~~
104 ☐ ON ~~MOTION~~ FURTHER PROCEEDINGS CONTINUED TO ~~AT~~ ~~A.M.~~ IN DEPT ☐ NON-APPEARANCE CALENDAR
105 ☐ SUPPLEMENTAL PROBATION REPORT IS ORDERED
106 ☐ DEFENDANT IS FOUND TO BE / NOT TO BE IN VIOLATION OF PROBATION.
107 ☐ PROBATION IS REVOKED / REMAINS REVOKED. SENTENCE IMPOSED AS FOLLOWS:
108 ☐ PROBATION REINSTATED / CONTINUED ON ORIGINAL TERMS AND CONDITIONS. EXCEPT FOR MODIFICATION THAT
109 ☐ SENTENCE / COUNTS TO RUN CONSECUTIVELY / CONCURRENTLY WITH
110 ☐ PURSUANT TO SEC. 17 PENAL CODE OFFENSE IS DEEMED TO BE A MISDEMEANOR
111 ☐ DEFENDANT IS SENTENCED TO ~~COUNTY JAIL~~; SENTENCE IS SUSPENDED.
112 ☐ PROBATION IS ORDERED TERMINATED PURSUANT TO SEC. 1203.3 PENAL CODE.
113 ☐ PLEA OF GUILTY OR CONVICTION IS SET ASIDE; A PLEA OF NOT GUILTY IS ENTERED; CASE IS DISMISSED PURSUANT TO SEC. 1203.4 PENAL CODE

PAYMENT OF DOCTORS/ATTORNEYS

114 ☐ THE COURT HAVING APPOINTED ~~PURSUANT TO~~ SECTION(S) ~~AND SAID SERVICE HAVING BEEN RENDERED / COMPLETED ON~~ ~~COURT FINDS THAT $~~ ~~IS A REASONABLE SUM FOR COMPENSATION AND~~ NECESSARY EXPENSES AND ORDERS A WARRANT BE DRAWN BY THE AUDITOR ON THE TREASURER FOR SAID SUM IN FAVOR OF
NAME:
ADDRESS:
CITY, STATE, ZIP:

115 ☐ THE COURT HAVING APPOINTED ~~PURSUANT TO~~ SECTION(S) ~~AND SAID SERVICE HAVING BEEN RENDERED / COMPLETED ON~~ ~~COURT FINDS THAT $~~ ~~IS A REASONABLE SUM FOR COMPENSATION AND~~ NECESSARY EXPENSES AND ORDERS A WARRANT BE DRAWN BY THE AUDITOR ON THE TREASURER FOR SAID SUM IN FAVOR OF
NAME:
ADDRESS:
CITY, STATE, ZIP:

116 ☐ REFERRAL TO DEPARTMENT 95 PURSUANT TO SECTION 3051 WELFARE AND INSTITUTIONS CODE CRIMINAL PROCEEDINGS SUSPENDED. PETITION ORDERED FILED IN DEPARTMENT 95 PURSUANT TO SEC. 3051 WELFARE AND INSTITUTIONS CODE. IN ORDER THAT AN EXAMINATION AND HEARING MAY BE HAD TO DETERMINE WHETHER DEFENDANT IS ADDICTED TO THE USE OF NARCOTIC DRUGS OR BY REASON OF REPEATED USE OF NARCOTICS IS IN IMMINENT DANGER OF BECOMING SO ADDICTED, AND DEFENDANT IS REMANDED TO CUSTODY OF THE SHERIFF OF LOS ANGELES COUNTY PENDING FURTHER ORDER OF DEPARTMENT 95
117 ☐ FURTHER PROCEEDINGS CONTINUED TO ~~AT~~ ~~A.M.~~ IN DEPT

MENTALLY DISORDERED SEX OFFENDER PROCEEDINGS

118 ☐ CRIMINAL PROCEEDINGS SUSPENDED. COURT INSTITUTES M.D.S.O. PROCEEDINGS.
119 ☐ DEFENDANT WAIVES / SERVED WRITTEN CERTIFICATION RE M.D.S.O. PROCEEDINGS.
120 ☐ PURSUANT SEC. 6307 WEL. & INST. CODE, COURT APPOINTS DR. AND DR. TO EXAMINE DEFENDANT.
121 ☐ SUPPLEMENTAL PROBATION REPORT ORDERED.
122 ☐ HEARING RE M.D.S.O. PROCEEDINGS. FURTHER CRIMINAL PROCEEDINGS CONTINUED TO ~~AT~~ ~~A.M.~~

123 ☐ COURT ADVISES DEFENDANT OF HIS APPEAL RIGHTS.
124 ☒ FURTHER ORDERS AS FOLLOWS: The Court finds after examination that the Deft is not capable of representing himself and his Pro Per status is Revoked and Pro Per has terminated. Deft's motion to act as Co-Counsel is Denied. Deft's motion for appointment of Private Counsel is Denied.

125 ☐ DEFENDANT FAILS TO APPEAR WITH / WITHOUT SUFFICIENT EXCUSE. BAIL FORFEITED / OWN RECOGNIZANCE REVOKED.
126 ☐ BENCH WARRANT ORDERED ISSUED / HELD UNTIL
127 ☐ NO BAIL / BAIL FIXED AT $

☒ REMANDED ☐ BAIL ☐ O.R. ☐ RELEASED ☐ DISCHARGED ☐ BAIL EXONERATED

PRINTED IN U.S.A. MINUTE ORDER Date: 4 MISC.

4 MISC.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Date JULY 24 1972 DEPT. 30 J

HONORABLE ELSWORTH M BEAM JUDGE W. I M AYERS Deputy Clerk

Deputy Sheriff (NONE) Reporter

CASE NO. A012485 (Parties and counsel checked if present)

PEOPLE OF THE STATE OF CALIFORNIA Counsel for People: DEPUTY DISTRICT ATTY.

VS Counsel for Defendant:

01 FARETTA ANTHONY PASQUALL

MINUTES ENTERED 7-24-72

CHARGE 487.3 01 Ct

NATURE OF PROCEEDINGS Acknowledgement of receipt of Motion purs 995 PC (BOX CHECKED IF ORDER APPLICABLE)

101 ☐

102 ☐ PUBLIC DEFENDER APPOINTED. D.P.D. BEING PRESENT

103 ☐ ON MOTION OF DEFENDANT RELIEVED, AND IS SUBSTITUTED AS ATTORNEY OF RECORD.

104 ☐ ON MOTION, FURTHER PROCEEDINGS CONTINUED TO AT A.M. IN DEPT. ☐ NON-APPEARANCE CALENDAR

105 ☐ **SUPPLEMENTAL PROBATION REPORT** IS ORDERED.

106 ☐ DEFENDANT IS FOUND **TO BE / NOT TO BE** IN VIOLATION OF PROBATION.

107 ☐ PROBATION IS **REVOKED / REMAINS REVOKED.** SENTENCE IMPOSED AS FOLLOWS:

108 ☐ PROBATION **REINSTATED / CONTINUED** ON ORIGINAL TERMS AND CONDITIONS. **EXCEPT FOR MODIFICATION** THAT

109 ☐ SENTENCE/COUNTS TO RUN CONSECUTIVELY / CONCURRENTLY WITH

110 ☐ PURSUANT TO SEC. 17 PENAL CODE, OFFENSE IS DEEMED TO BE A MISDEMEANOR.

111 ☐ DEFENDANT IS SENTENCED TO COUNTY JAIL; SENTENCE IS SUSPENDED.

112 ☐ PROBATION IS ORDERED **TERMINATED** PURSUANT TO SEC. 1203.3 PENAL CODE.

113 ☐ PLEA OF GUILTY OR CONVICTION IS SET ASIDE; A PLEA OF NOT GUILTY IS ENTERED; CASE IS **DISMISSED** PURSUANT TO SEC. 1203.4 PENAL CODE.

PAYMENT OF DOCTORS/ATTORNEYS

114 ☐ THE COURT HAVING APPOINTED PURSUANT TO SECTION(S) AND SAID SERVICE HAVING BEEN RENDERED/COMPLETED ON COURT FINDS THAT $ IS A REASONABLE SUM FOR COMPENSATION AND NECESSARY EXPENSES AND ORDERS A WARRANT BE DRAWN BY THE AUDITOR ON THE TREASURER FOR SAID SUM IN FAVOR OF

NAME:
ADDRESS:
CITY, STATE, ZIP:

115 ☐ THE COURT HAVING APPOINTED PURSUANT TO SECTION(S) AND SAID SERVICE HAVING BEEN RENDERED/COMPLETED ON COURT FINDS THAT $ IS A REASONABLE SUM FOR COMPENSATION AND NECESSARY EXPENSES AND ORDERS A WARRANT BE DRAWN BY THE AUDITOR ON THE TREASURER FOR SAID SUM IN FAVOR OF

NAME:
ADDRESS:
CITY, STATE, ZIP:

116 ☐ **REFERRAL TO DEPARTMENT** 95 PURSUANT TO SECTION 3051 WELFARE AND INSTITUTIONS CODE CRIMINAL PROCEEDINGS SUSPENDED. PETITION ORDERED FILED IN DEPARTMENT 95 PURSUANT TO SEC. 3051 WELFARE AND INSTITUTIONS CODE. IN ORDER THAT AN EXAMINATION AND HEARING MAY BE HAD TO DETERMINE WHETHER DEFENDANT IS ADDICTED TO THE USE OF NARCOTIC DRUGS OR BY REASON OF REPEATED USE OF NARCOTICS IS IN IMMINENT DANGER OF BECOMING SO ADDICTED, AND DEFENDANT IS REMANDED TO CUSTODY OF THE SHERIFF OF LOS ANGELES COUNTY PENDING FURTHER ORDER OF DEPARTMENT 95.

117 ☐ FURTHER PROCEEDINGS CONTINUED TO AT A.M. IN DEPT.

MENTALLY DISORDERED SEX OFFENDER PROCEEDINGS

118 ☐ CRIMINAL PROCEEDINGS SUSPENDED. COURT INSTITUTES M.D.S.O. PROCEEDINGS.

119 ☐ DEFENDANT WAIVES/SERVED WRITTEN CERTIFICATION RE M.D.S.O. PROCEEDINGS.

120 ☐ PURSUANT SEC 6307 WEL. & INST. CODE COURT APPOINTS DR. AND DR. TO EXAMINE DEFENDANT.

121 ☐ SUPPLEMENTAL PROBATION REPORT ORDERED.

122 ☐ HEARING RE M.D.S.O. PROCEEDINGS. FURTHER CRIMINAL PROCEEDINGS **CONTINUED TO** AT A.M.

123 ☐ COURT ADVISES DEFENDANT OF HIS APPEAL RIGHTS.

124 ☐ **FURTHER ORDERS AS FOLLOWS:**

The Court acknowleges receipt of letter dated July 12 1972 and the Notice of Motion pursuant to Sec 995 P.C. which the Court is turning over to the Public Defender in this case. Copy of this minute order mailed to: Anthony Faretta, 1992-490 2500 B-6, LosAngeles Central Jail, 441 Bauchet St., Los Angeles, Ca 90012.

125 ☐ DEFENDANT FAILS TO APPEAR WITH/WITHOUT SUFFICIENT EXCUSE. **BAIL FORFEITED/OWN RECOGNIZANCE** REVOKED.

126 ☐ **BENCH WARRANT** ORDERED ISSUED/**HELD** UNTIL

127 ☐ NO BAIL/BAIL FIXED AT $

☐ REMANDED ☐ BAIL ☐ O.R. ☐ RELEASED ☐ DISCHARGED ☐ BAIL EXONERATED

REVISED 12-71

MINUTE ORDER Date:

4 MISC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPT. 50-J

Date: AUGUST 2, 1972
HONORABLE CARROLL M. DUNHAM, JUDGE
MARK W. BAILEY, Deputy Sheriff
S. F. PERKISS, Deputy Clerk
S. BOREN, Reporter
(Parties and counsel checked if present)

10

~~XXXXXXXX~~ A 012485
PEOPLE OF THE STATE OF CALIFORNIA

VS

01 FARESTA, ANTHONY RUSSELL ✓

Counsel for People: DEPUTY DISTRICT ATTY: GEORGE ZUGSMITH ✓

Counsel for Defendant: DEPUTY PUBLIC DEFENDER: A. LIEMAN ✓

1367.3 PC 3 ct

Statistical Code	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
Clerks Use Only																

NATURE OF PROCEEDINGS: TRIAL

Cause is called for trial. All parties present as indicated. On People's motion information is amended to allege 4 priors, Defendant is rearraigned and denies the priors. On defendant's motion the motion pursuant to Section 995 Penal Code is withdrawn.

By order of the Court the following jurors are impaneled and sworn to try the cause:

Mrs. Mary Zaloga	Mrs. Betty J. Snyder
Norman Rogers	Richard T. Sims
Mrs. Betty L. Johnston	Mrs. Lorraine G. Sundstron
Mrs. Shirley L. Schmidt	Harold D. Cooper
Mrs. Sandra J. Spikis	Donald R. Jensen
Isiah Ross	Thomas R. Thompson, Jr.

Opening argument is made by People and reserved by defendant. Jury is admonished and trial is continued to August 3, 1972 at 9:00 a.m.

Defendant Remanded

Entered 8-2-72

Dept.

76M414D2 - 10/68

10

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPT. SO-J

Date: AUGUST 3, 1972
HONORABLE CARROLL M. DUNNUM — JUDGE
HONORABLE MARK W. BAILEY — Deputy Sheriff
S. F. PERKISS — Deputy Clerk
S. BOREN — Reporter
(Parties and counsel checked if present)

11

A 012485
PEOPLE OF THE STATE OF CALIFORNIA

VS

01 FARETTA, ANTHONY PASQUALL

Counsel for Plaintiff: GEROGE ZUGSMITH, DEPUTY DISTRICT ATTORNEY

Counsel for Defendant: A. LIEMAN, DEPUTY PUBLIC DEFENDER

487.3 1 ct

Statistical Code	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
Clerks Use Only																

NATURE OF PROCEEDINGS:

JURY TRIAL

Trial resumes from August 2, 1972, with all parties present and jurors as before. Out of the presence of the jury, the defendant personally moves the court for pro per status of for the appointment of a private attorney under Section 987.2 P.C. Motion is argued and denied.

In open Court with all present: Dean Howard Telfore, Margaret Ann Telfore, Jack S. Edwards, Patricia Ann Hamilton, Patrick Orvie Riley, Billy Donns Sims, Bart K. Triesch, Jeffrey Cornell Bird, Walter S. Williamsson and Virgil R. Shitley are sworn and testify for the People. People's exhibits one through 6 (each a photo), 7 (cert of ownership), 8 (car keys), 9 (L. A. traffic citation), 10(Long Beach traffic citation), 11 (pink slip from car), 12 (suspense receipt), 13(suspense receipt), 14(bill of sale), 15 (set of license plates), 16 (2 sets of cert. copies from DMV), 17 (one set of cert. copies from DMV), 18(cooy of arrest rept.) and 19 ((Superior Court file no. CR 309498)(by reference) are all marked for identification only.

Jury is admonished and trial is continued to August 4, 1972 at 9:30 a.m.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPT. SO-J

Date: AUGUST 4, 1972

HONORABLE CARROLL M. DUNNUM JUDGE | S. F. PERKISS, Deputy Clerk
MARK W. BAILEY, Deputy Sheriff | S. BOREN, Reporter
8 (Parties and counsel checked if present)

A 012485

PEOPLE OF THE STATE OF CALIFORNIA — Counsel for Plaintiff: GEROGE ZUGSMITH, DEPUTY DISTRICT ATTORNEY

VS

01 FARETTA, ANTHONY PASQUALL — Counsel for Defendant: A. LIEMAN, DEPUTY PUBLIC DEFENDER

487.3 1 ct

Statistical Code	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
Clerks Use Only																

NATURE OF PROCEEDINGS:

Trial resumes from August 3, 1972, with all parties and jurors present as before. Walter M. Schultz, Wallace Dillon, Wesley M. Bertz and Steve Housden are sworn and testify for the People.

People's exhibits 20 (Long Beach P.D identification sheet), 21 (copy of exemplar card), 22 (partial set of finger prints from L.B. P.D), 23(Los Angeles County Superior Court file No. 309498) (BY REFERENCE), 24 certified copies of Superior Court file from Orange County) are all received in evidence, and exhibit 25 (Distirct attorney's file no #380784) is marked for identification only (BY REFERENCE). People'sexhibits one through 19 all previously marked for identification only is now received in evidence. People rest.

Opening statement is waived by defendant. Anthony Pasquall is swofn and testifies for the defendant. Defendant rests. Plaintiff's exhibit 26 (note of deft.) is received in evidence. Both rest.

Jury is admonished and trial is continued to August 7, 1972 at 9:30 a.m.

12

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

FILED

The People of the State of California PLAINTIFF(S) VS. ANTHONY PASQUALL FARETTA DEFENDANT(S)	CASE NUMBER A 012485	DEPARTMENT NUMBER SOUTH J
	VERDICT (Guilty)	

WILLIAM G. SHARP, County Clerk
BY D. P. PERKINS, DEPUTY

We, the Jury in the above-entitled action, find the Defendant ANTHONY PASQUALL FARETTA guilty of GRAND THEFT, IN VIOLATION OF SECTION 487.3 PENAL CODE

FILED
AUG 7 1972
WILLIAM G. SHARP, County Clerk
BY D. P. PERKINS, DEPUTY

as charged in _____ the _____ information

This 7 day of AUGUST 19 72. J R Thompson
Foreman

76V210 - CR8 - 4/69

VERDICT (Guilty)

FILED

AUG 7 1972

WILLIAM G. SHARP, County Clerk

BY B. P. PERKINS, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

	CASE NUMBER	DEPARTMENT NUMBER
The People of the State of California PLAINTIFF(S) vs. ANTHONY PASQUALI FARETTA DEFENDANT(S)	A 012485	SOUTH J
	VERDICT ~~(Not Guilty)~~ (PRIOR)	

We, the Jury in the above-entitled action, find the ~~allegation~~ the allegation of the prior conviction ~~of~~ of violation of 11530 Health and Safety Code as charged in case no. 309498 in the County of Los Angeles about the 30th day of November, 1965 to be (not true ( )
(true (X)

as charged in the information.

This 7 day of AUGUST 19 72. J R Thompson
Foreman

VERDICT (Not Guilty)

76V225 - 4/69

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

FILED
AUG 7 1972
WILLIAM G. SHA. P, County Clerk
BY D. P. PERSON, DEPUTY

	CASE NUMBER	DEPARTMENT NUMBER
The People of the State of California PLAINTIFF(S) vs. ANTHONY PASQUALL FARETTA DEFENDANT(S)	A 012485	SOUTH J
	VERDICT ~~XXXXXX~~ (PRIOR)	

We, the Jury in the above-entitled action, find the ~~DEFENDANTXXX~~ the allegation of the ~~prior conviction~~ ~~guilty~~ of violation of Section 11530 Health and Safety Code as charged in Superior Court in the County of Orange about the 5th day of May, 1967 is { TRUE (X) / NOT TRUE ( )

as charged in _____ the _____ information

This 7 day of AUGUST 1972. T. R. Thompson
Foreman

76V210 - CR8 - 4/69

VERDICT (Guilty)

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

FILED
AUG 4 1972
GILLIAM G. SHARP, County Clerk
BY G. P. PERRIED, DEP.

	CASE NUMBER	DEPARTMENT NUMBER
The People of the State of California PLAINTIFF(S) vs. ANTHONY PASQUALL FARETTA DEFENDANT(S)	A 012485	SOUTH J
	VERDICT [redacted] (PRIOR)	

We, the Jury in the above-entitled action, find the [redacted] allegation of the prior conviction [redacted] of violation of 10851 Vehicle Code as charged in the case no A 006595, Los Angeles County, about the 25th day of March, 1970 to be

true (X)
not ture ( )

as charged in the information.

This 7 day of AUGUST 19 72. J R J Romero
Foreman

VERDICT (Not Guilty)

76V225 - 4/69

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

The People of the State of California PLAINTIFF(S) VS. ANTHONY PASQUALL FARETTA DEFENDANT(S)	CASE NUMBER A 012485 DEPARTMENT NUMBER SOUTH J VERDICT (Guilty) (PRIOR)

We, the Jury in the above-entitled action, find the ~~Defendant~~ allegation of the prior conviction ~~or guilty~~ of violation of 487.3 Penal Code as charged in the Los Angeles County case number A 006595 about the 25th day of March, 1970 to be { not true ( ) / true (X)

as charged in _____ the _____ information

This 7 day of AUGUST 19 72 J. R. Thompson
Foreman

VERDICT (Guilty)

76V210 - CR8 - 4/69

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPT. SB-J

Date: AUGUST 7, 1972

HONORABLE CARROLL M. DUNNUM, JUDGE | S. F. PERKISS, Deputy Clerk
13 A MARK W. BAILEY, Deputy Sheriff | S. BOREN, Reporter
(Parties and counsel checked if present)

A 012485
PEOPLE OF THE STATE OF CALIFORNIA — Counsel for Plaintiff: GEORGE ZUGSMITH, DEPUTY DISTRICT ATTORNEY

VS
FARETTA,
01 ANTHONY PASQUALL XXXXXXX — Counsel for Defendant: A. LIEMAN, DEPUTY PUBLIC DEFENDER
487.3

Statistical Code | Clerks Use Only

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16

NATURE OF PROCEEDINGS: TRIAL- JURY

Trial resumes from August 4, 1972, with all parties and jurors present as before. But of the presence of the jury:

Pursuant to stipulation and order the clerk photocopies certain documents from People's exhibit 19 (Superior Court file 309498) by reference and exhibt 23 (Superior Court filed no. A 006595) by reference. Pursuant to stipulation and order the photocopies are substituted as exhibits and received in evidence.

In open Court:

Cause is argued. Jury is instructed and bailiff is sworn to take charge of the jury. At 1:50 p.m. the jury retire to commence deliberations. At 2:30 p.m. the jury return into the courtroom with the following verdicts:

(Title of Court and Cause)

"We, the Jury in the above-entitled action, find the Defendant Anthony Pasquall Faretta guilty of Grand theft, in violation of Section 487.3 Penal Code as charged in the information.

This 7 day of August, 1972 T. R. Thompson, Foreman."

Jury is pilled and all answer "yes".

(Title of Court and Cause)

"We, the Jury in the avove-entitled action, find the allegation of the prior conviction of violation of 11530 Health and Safety Code as charged in the information in case no 309498 in the County of Los Angeles about the 30th day of November, 1965, to be (true ( )
(not true (X).

This 7 day of August, 1972 T. R. Thompson, Foreman."

(Title of Court and Cause)

"We, the Jury in the avove-entitled actioh, find the allegation of the prior conviction of violation of Section 11530 Health and Safety Code as charged in Superior Court in the County of Orange about the 5th day of May, 1967 to be
TRUE (X)
NOT TRUE ( ) as charged in the information.

This 7 day of August, 1973 T. R. Thompson, Foreman."

7SM414DS - 10/69

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPT. SO-J

Date: AUGUST 7, 1972
HONORABLE CARROLL M. BUNNUM JUDGE
13 B MARK W. BAILEY Deputy Sheriff
S. F. PERKISS Deputy Clerk
S. BOREN Reporter
(Parties and counsel checked if present)

A 012485
PEOPLE OF THE STATE OF CALIFORNIA
Pg 2
VS
of
01 FARETTA, ANTHONY PASQUALL
pg 2

Counsel for Plaintiff: GEORGE ZUGSMITH, DEPUTY DISTRICT ATTORNEY
Counsel for Defendant: A. LIEMAN, DEPUTY PUBLIC DEFENDER

Statistical Code / Clerks Use Only: 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16

NATURE OF PROCEEDINGS: JURY TRIAL (continued)

(Title of Court and Cause)

"We, the Jury in the above-entitled-action, find the allegation of the prior conviction of violation of 10851 Vehicle Code as charged in the case no. A 006595, Los Angeles County, about the 25th day of March, 1970, to be (TRUE (X)
(NOT TURE( )
(
as charged in the information.
This 7 day of August, 1972
T. R. Thompson, Foreman."

(Title of Court and Cause)

"We, the Jury in the above-entitled action, find the allegation of the prior conviction of violation of 487.3 Penal Code as charged in the Los Angels County case No. A 006595 about the 25th day of March, 1970 to be (not true ( )
(true (X)
(
as charged in the information.
This 7 day of August, 1972
T. R. Thompson, Foreman."

Jury is polled as to all priors and all answer "yes". Jury is discharged. Verdicts are filed. All verdicts submitted to jury are filed. Rereading of verdicts are waived. Instruction given, refused and withdrawn are filed. Defendant waives time for sentence, referred to probation department. Probation and sentence hearing is set for September 5, 1972 at 9:00 a.m in Department J.

Defendant is remanded.

Dept.

T4M4014D2 - 10/69

3 P&S

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

SOJ

Date SEPTEMBER 05 1972
HONORABLE EL SWORTH BEAM JUDGE
804 ~~E SUTTON~~ J. Simon Deputy Sheriff
DEPT. I M AYERS ~~H KENES~~
M DeBeckin Deputy Clerk, Reporter

CASE NO. 900AM A012485
(Parties and counsel checked if present)
PEOPLE OF THE STATE OF CALIFORNIA
VS
01 FARETTA ANTHONY PASQUALL
487.3 01CTS (4 Ctns)
Counsel for People: DEPUTY DISTRICT ATTY. R. Berger
Counsel for Defendant: A LIEMAN PD
CHARGE X498838
MINUTES ENTERED 7-5-72

NATURE OF PROCEEDINGS P&S (BOX CHECKED IF ORDER APPLICABLE)

71 ☐
72 ☐ — PUBLIC DEFENDER APPOINTED. D.P.D. ..... BEING PRESENT.
73 ☐ CRIMINAL PROCEEDINGS RESUMED/ADJOURNED.
74 ☐ —
75 ☐ DEFENDANT ORDERED DELIVERED TO DEPARTMENT OF CORRECTIONS PER SEC. 1203.03 PENAL CODE.
76 ☐ — ON ..... MOTION, PROBATION AND SENTENCE HEARING CONTINUED TO ..... AT ..... A.M. IN DEPT. ..... ☐ NON-APPEARANCE CALENDER
77 ☐ SUPPLEMENTAL PROBATION REPORT ORDERED.
78 ☐ — DEFENDANT PERSONALLY AND ALL COUNSEL WAIVE TIME FOR SENTENCING.
79 ☐ PROBATION DENIED. SENTENCE IS IMPOSED AS FOLLOWS.
☐ IMPRISONED IN STATE PRISON FOR TERM PRESCRIBED BY LAW.
☐ COMMITTED TO CALIFORNIA YOUTH AUTHORITY.
☐ IMPRISONED IN LOS ANGELES COUNTY JAIL FOR TERM OF .....
☐ FINED IN SUM OF $ ..... PLUS PENALTY ASSESSMENT. TO BE PAID TO COUNTY CLERK.
80 ☐ — SENTENCE IS SUSPENDED.
81 ☐ PROCEEDINGS SUSPENDED.
82 ☐ — PROBATION GRANTED FOR PERIOD OF ..... YEARS (SEE CONDITIONS LISTED BELOW).
83 ☐ PROBATION TO BE WITHOUT FORMAL SUPERVISION.

1 ☐ SPEND FIRST ..... IN COUNTY JAIL. ☐ ROAD CAMP OR HONOR FARM RECOMMENDED.
2 ☐ — PAY FINE OF $ ..... (P.A. TO COUNTY CLERK/PROBATION OFFICER IN SUCH MANNER AS HE SHALL PRESCRIBE.
3 ☐ MINIMUM PAYMENT OF FINE/RESTITUTION TO BE $ .....
4 ☐ — MAKE RESTITUTION THROUGH P.O. IN SUCH AMOUNT AND MANNER AS OFFICER SHALL PRESCRIBE.
5 ☐ NOT DRINK ANY ALCOHOLIC BEVERAGE AND STAY OUT OF PLACES WHERE THEY ARE THE CHIEF ITEM OF SALE.
6 ☐ — NOT USE OR POSSESS ANY NARCOTICS, DANGEROUS OR RESTRICTED DRUGS OR ASSOCIATED PARAPHERNALIA, EXCEPT WITH VALID PRESCRIPTION, AND STAY AWAY FROM PLACES WHERE USERS CONGREGATE.
7 ☐ NOT ASSOCIATE WITH PERSONS KNOWN BY YOU TO BE NARCOTIC OR DRUG USERS OR SELLERS.
8 ☐ — SUBMIT TO PERIODIC ANTI-NARCOTIC TESTS AS DIRECTED BY THE PROBATION OFFICER.
9 ☐ HAVE NO BLANK CHECKS IN POSSESSION, NOT WRITE ANY PORTION OF ANY CHECKS, NOT HAVE BANK ACCOUNT UPON WHICH YOU MAY DRAW CHECKS.
10 ☐ — NOT GAMBLE OR ENGAGE IN BOOKMAKING ACTIVITIES OR HAVE PARAPHERNALIA THEREOF IN POSSESSION, AND NOT BE PRESENT IN PLACES WHERE GAMBLING OR BOOKMAKING IS CONDUCTED.
11 ☐ NOT ASSOCIATE WITH .....
12 ☐ — COOPERATE WITH P.O. IN A PLAN FOR .....
13 ☐ SUPPORT DEPENDANTS AS DIRECTED BY PROBATION OFFICER.
14 ☐ — SEEK AND MAINTAIN TRAINING, SCHOOLING OR EMPLOYMENT AS APPROVED BY THE P.O.
15 ☐ MAINTAIN RESIDENCE AS APPROVED BY P.O. (DEF'T. MAY RESIDE IN .....
UNDER THE TERMS OF .....).
16 ☐ — SURRENDER DRIVER'S LICENSE TO CLERK OF COURT TO BE RETURNED TO D.M.V.
17 ☐ NOT DRIVE A MOTOR VEHICLE UNLESS LAWFULLY LICENSED AND INSURED.
18 ☐ — NOT OWN, USE OR POSSESS ANY DANGEROUS OR DEADLY WEAPONS.
19 ☐ SUBMIT HIS PERSON AND PROPERTY TO SEARCH OR SEIZURE AT ANY TIME OF THE DAY OR NIGHT BY ANY LAW ENFORCEMENT OFFICER WITH OR WITHOUT A WARRANT.
20 ☐ — OBEY ALL LAWS, ORDERS, RULES AND REGULATIONS OF THE PROBATION DEPT. AND OF THE COURT.

84 ☐ — DEFENDANT TO BE GIVEN CREDIT FOR TIME ALREADY SERVED (..... DAYS)
85 ☐ SENTENCE/COUNTS TO RUN CONSECUTIVELY/CONCURRENTLY WITH .....
86 ☐ — STAY OF EXECUTION GRANTED TO .....
87 ☐ SECTION 13202(B) VEHICLE CODE DOES/DOES NOT APPLY.
88 ☐ — PURSUANT TO SEC. 17 PENAL CODE, OFFENSE IS DEEMED TO BE A MISDEMEANOR.
89 ☐ ON MOTION OF PEOPLE, COUNTS ..... DISMISSED IN FURTHERANCE OF JUSTICE.
90 ☐ — COURT ADVISES DEFENDANT OF HIS APPEAL RIGHTS.
91 ☒ FURTHER ORDER AS FOLLOWS/~~ADDITIONAL CONDITIONS OF PROBATION~~:
Cause set for pre-trial Dept 56 C.

92 ☐ — DEFENDANT FAILS TO APPEAR WITH/WITHOUT SUFFICIENT EXCUSE. BAIL FORFEITED/OWN RECOGNIZANCE REVOKED.
93 ☐ BENCH WARRANT ORDERED ISSUED/HELD UNTIL .....
94 ☐ — NO BAIL/BAIL FIXED AT $ .....
95 ☐ DEFENDANT APPEARING. BENCH WARRANT ORDERED RECALLED/QUASHED.
96 ☐ — ORDER OF ..... FORFEITING BAIL VACATED. BAIL REINSTATED ON FILING OF REASSUMPTION AND PAYMENT OF $ ..... COSTS BEFORE .....
97 ☐ REASSUMPTION FILED/COSTS PAID (RECEIPT NO. .....). BAIL REINSTATED.

☒ REMANDED ☐ BAIL ☐ O.R. ☐ RELEASED ☐ DISCHARGED ☐ BAIL EXONERATED

MINUTE ORDER Date:

3 P&S

20

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES **DEPT.** 80 C

Date: SEPTEMBER 5, 1972
HONORABLE: CARROLL M DUNNUM JUDGE
MARK W BAILEY Deputy Sheriff

S E PERKISS , Deputy Clerk
YOLANDA POTTER , Reporter
(Parties and counsel checked if present)

A012485
PEOPLE OF THE STATE OF CALIFORNIA Counsel for Plaintiff JOSEPH P HUGHES, EVELLE J. YOUNGER, DISTRICT ATTY. BY DEPUTY
VS R BERGER

ANTHONY PASQUALL FAVETTA Counsel for Defendant
X4[illegible]8838 R. S. BUCKLEY, PUBLIC DEFENDER BY DEPUTY
A LIEHAN

NATURE OF PROCEEDINGS PROBATION AND SENTENCE

(Boxes checked if order applicable)

THE COURT STRIKES THE P JORS.

DEFENDANT'S MOTION FOR REFERRAL TO DEPARTMENT 95 IS ARGUED AND DENIED.

PROBATION DENIED. SENTENCE AS INDICATED BELOW.

Whereas the said defendant having ....been....duly.....found
guilty in this court of the crime of GRAND THEFT, In Violation of Section 487.3,
Penal Code, a felony, as charged in the Information,

It is Therefore Ordered, Adjudged and Decreed that the said defendant be punished by imprisonment in the

☐ County Jail of the County of Los Angeles for the term of.....

☒ State Prison for the term prescribed by law. DEFENDANT TO BE GIVEN CREDIT FOR 105 DAYS ALREADY SERVED.

☐ California Institution for Women for the term prescribed by law.

It is further Ordered that the defendant be remanded into the custody of the Sheriff of the County of Los Angeles

☒ to be by him delivered into the custody of the Director of Corrections at the California State Prison at Chino.

☐ to be by him delivered into the custody of the Director of Corrections at the California State Institution for Women at Frontera.

Defendant's motion for bail on appeal is denied.

THIS MINUTE ORDER WAS ENTERED

SEPTEMBER 5, 1972
WILLIAM G. SHARP, COUNTY CLERK AND CLERK OF THE SUPERIOR COURT.

☐ Remaining count(s) dismissed in interests of justice.
☐ Bail exonerated.

2 765 CCRA - 6/70

JUDGMENT

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPT. SC-C

Date: OCTOBER 2,1972

HONORABLE CARROLL L. DUNLAP JUDGE | S. P. PERKINS, Deputy Clerk
2 HAL A. BAILEY Deputy Sheriff | S. LOMB, Reporter
(Parties and counsel checked if present.)

A 012185

PEOPLE OF THE STATE OF CALIFORNIA

VS

CI FARETTA, ANTHONY FAGUALL

Counsel for Plaintiff: VICTOR J. LUGSDIN, DEPUTY DISTRICT ATTORNEY

Counsel for Defendant: A. LILLAH, DEPUTY PUBLIC DEFENDER

487.3

Statistical Code

Clerks Use Only

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16

22

NATURE OF PROCEEDINGS: Nunc Pro Nunc Order

Through inadvertence and clerical error the minute order of 8/7/72 is corrected nunc pro nunc as of said date as follows:
Correct minute order of verdict to read:
"We, the jury in the above entitled action, find the allegation of the xx prior conviction on 11530 H&S and Penal Code as charged in the information in case No 369490 in the County of Los Angeles about the 30th day of November, 1965 to be true (XX)
not true ( )
this 7th day of August, 1972 T. K. Thompson, Foreman."

(Correction made in to show "true" and not "not true.")

[Filed Sep. 5, 1972, William G. Sharp, County Clerk, By Elma S. Combs, Deputy]

ANTHONY PASQUALL FARETTA
Booking No. 1992 490
P.O. Box 54320
Terminal Annex
Los Angeles, California 90054

In Propria Persona

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. A 012 485

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

vs.

ANTHONY PASQUALL FARETTA, DEFENDANT

NOTICE OF APPEAL

Defendant ANTHONY PASQUALL FARETTA hereby appeals from the judgment rendered against him in the above-entitled action.

Dated: September 5, 1972

/s/ Anthony P. Faretta
ANTHONY PASQUALL FARETTA

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

2D Crim. No. 22722

THE PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF AND RESPONDENT

v.

ANTHONY PASQUALL FARETTA,
DEFENDANT AND APPELLANT

PETITION FOR HEARING

• • • •

III. THE COURT GRANTED DEFENDANT'S MOTION TO REPRESENT HIMSELF. LATER THE COURT REVOKED "PRO PER" STATUS. THE COURT WAS WITHOUT POWER TO REVOKE "PRO PER" STATUS.

Defendant contends that once the Court granted defendant's motion to represent himself, the Court could not revoke the grant. (A. O. B. 14-15)

The opinion, in part, states: "Faretta had no constitutional right to represent himself. (citation) And we cannot say that the trial court abused its discretion—*Smith* v. *Superior Court*: 68 Cal 2d 547, relied on by Faretta, is not in point. (Opinion page 4)

But *Smith* held that the right to counsel requires that counsel be free in all cases of the threat that he may be summarily relieved as incompetent. The judge may intervene to assist. Also, a defendant who is "pro per" should be free of the threat that he may be summarily relieved.

• • • •

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

[Filed Jun. 26, 1973, Court of Appeal, Second Dist., Clay Robbins, Jr., Clerk]

2D Crim. No. 22722

(Sup. Ct. No. A 012 485)

THE PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF AND RESPONDENT

v.

ANTHONY PASQUALL FARETTA,
DEFENDANT AND APPELLANT

APPEAL from judgment of the Superior Court of Los Angeles County. Carroll M. Dunnum, Judge. Affirmed.

Norman W. De Carteret, Esq., under appointment by the Court of Appeal, for Appellant.

Evelle J. Younger, Attorney General, Edward A. Hinz, Jr., Chief Assistant Attorney General—Criminal Division, William E. James, Assistant Attorney General—Appeals Section, Howard J. Schwab and Donald J. Oeser, Deputy Attorneys General, for Respondent.

Anthony Pasquall Faretta appeals the judgment after conviction by a jury for grand theft. (Pen. Code, § 487, subd. 3.)

FACTS

Dean Telford's 1963 Chevrolet Nova was stolen from the street in front of his home in Long Beach between 11:00 p.m. on 21 May 1972 and 4:00 a.m. on 22 May 1972. At 6:00 a.m. on 22 May 1972 Compton Police

Officer Edwards stopped defendant Faretta for a traffic violation. Faretta was driving Telford's Nova. The Nova was "hotwired" and the license plates had been changed. Faretta told Edwards he purchased the Nova from "Nubly" two or three days before. Faretta showed Edwards keys he said belonged to the car, but the keys did not work the Nova's locks.

After his arrest, Faretta telephoned the managers of the hotel where he lived and asked them to remove a tapedeck and pink slip (certificate of automobile ownership) from his room and to alter the pink slip to show that Faretta owned the car. The tapedeck and pink slip were in the Nova when it was stolen. The managers gave the tapedeck and pink slip to the police. An investigating officer found another 1963 Chevrolet Nova without license plates parked a block from Faretta's hotel.

Faretta testified for the defense that he bought Telford's Nova from "Jerry" on the evening of 21 May 1972 and switched license plates from another Nova he owned to the newly-purchased one. While in jail awaiting trial, Faretta attempted to pass a note to another prisoner: "Jerry . . . I've been down since May 21, on a GTA. I told them when I got busted I bought the car from a guy named Jerry . . . If you sold me the car on the 20th of May, 1972 about 10:00 p.m. please confide in my attorney and we'll try to get around in the court. . . ."

ISSUES

Faretta contends (1) the court should have permitted him to represent himself; (2) there was no probable cause for his arrest; (3) the pink slip was illegally seized by an agent of the police; (4) he was denied his right to produce witnesses; (5) the prosecutor's question concerning a prior consistent statement was prejudicial misconduct; and (6) the court should have instructed the jury concerning the limited use of evidence of prior offenses.

DISCUSSION

1. *Representation.*

The court initially granted Faretta's motion to represent himself. During pretrial proceedings, however, the court concluded that Faretta had not intelligently waived his right to be represented by counsel, and appointed counsel to represent him at trial. Faretta contends the court erred.

We find no error. Faretta had no constitutional right to represent himself. (*People* v. *Sharp*, 7 Cal.3d 448, 459-460.) And we cannot say that the trial court abused its discretion in concluding that Faretta had not made a knowing and intelligent waiver of his right to be represented by counsel. (*People* v. *Floyd*, 1 Cal.3d 694, 702-705.) Despite his desire to be his own attorney, Faretta did not appear aware of the possible consequences of waiving the opportunity for skilled and experienced representation at trial.

Smith v. *Superior Court*, 68 Cal.2d 547, relied on by Faretta, is not in point. *Smith* involved the right of the trial court to replace a court-appointed attorney based on the court's subjective belief that the attorney was not competent to handle the case. The defendant's understanding of the consequences of retaining the attorney was not in issue.

2. *The Arrest.*

Faretta contends there was no probable cause for his arrest and therefore that the car he was driving was illegally seized.

We need not consider this contention because Faretta did not object on this ground at trial. (*People* v. *Flores*, 68 Cal.2d 563, 567.) Moreover, Faretta improperly relies on statements in an arrest report not part of the record on appeal. (*People* v. *Gardner*, 71 Cal.2d 843, 849.) In any event, Officer Edwards testified that when he stopped Faretta for a traffic violation, Faretta stated he did not have a driver's license and did not know where the registration for the Nova was. Edwards saw

that the Nova had been hotwired. Faretta gave Edwards an automobile registration slip that listed the license plates on the Nova but a different vehicle registration number. Edwards ran a check on the vehicle registration number of the Nova, and learned that the Nova should have had a different set of license plates. These facts amply justified Faretta's arrest for theft of the Nova.

3. *The Pink Slip.*

Faretta contends the police obtained the pink slip by an illegal search and seizure. He argues that the hotel manager who found the pink slip in Faretta's hotel room and gave it to the police was acting as an agent of the police.

Faretta testified that he asked the hotel managers to find the pink slip and give it to the police. The hotel managers testified that Faretta asked them to find the pink slip and alter it. The investigating police officer testified that one of the hotel managers told him she was going to look for the pink slip and asked if the officer wanted to be present; he waited outside Faretta's hotel room door until the manager located the pink slip.

The contention is without merit. If Faretta asked the managers to find the pink slip and give it to the police, then he consented to the search. If Faretta asked the managers to find the slip and alter it, he may not complain if the managers violated his confidence and gave the slip to the police. (See *Hoffa* v. *United States*, 385 U.S. 293, 300-303.) And if the investigating officer merely stood by while the hotel manager carried out her own search, we cannot say that the police were so involved in the planning and execution of the search as to render the hotel manager an agent of the police. (See *Raymond* v. *Superior Court*, 19 Cal.App.3d 321, 325-326.)

4. *Right to Produce Witnesses.*

Faretta contends he was denied the right to produce witnesses because his counsel did not call as a witness

Charles Cunningham, the passenger with Faretta in the Nova when he was arrested.

The contention is spurious. Faretta did not present this claim at trial. He made no showing that Cunningham would have given relevant testimony. (See *People* v. *Vatelli*, 15 Cal.App.3d 54, 58-59.) And Faretta's own testimony proves that Cunningham could not be located:

"Q You have maintained contact with that gentleman since you have been incarcerated; isn't that correct? A Charles Cunningham? Q Yes. A No. His mother is very interested in knowing where he is at. I have maintained contact with her. Q You don't know where Charles is? A I don't. Q Have you made any efforts to find him? A Previous to a competency hearing and my subsequent termination, you know, of defendant's representative for defendants, I had subpoenaed Charles Cunningham to the County for an interview, and I called his mother several times. I have tried to contact him, and I asked [defense counsel] to endeavor to contact him, and all this has proved fruitless."

5. *Prosecutorial Misconduct.*

Faretta testified that after his arrest he called the hotel managers and told them to find the pink slip and give it to the police. On cross-examination the prosecutor asked Faretta why he did not tell that to the district attorney before trial. The court sustained an objection to that question, denied a motion for mistrial, and admonished the jury to disregard the question.

The prosecutor erred in questioning Faretta about his failure to make exculpatory statements before trial. (*People* v. *Reese*, 220 Cal.App.2d 143, 146.) However, in light of the overwhelming evidence of guilt, the court's specific prompt admonition to the jury to disregard the question, and the court's general instruction to the jury that questions are not evidence, we are convinced beyond a reasonable doubt that the error was harmless. (*People* v. *Crawford*, 253 Cal.App.2d 524, 536; *Chapman* v. *California*, 386 U.S. 18, 24.)

6. *Limited Use of Prior Offenses.*

The information alleged that Faretta had four prior felony convictions. Faretta denied the allegations. The prosecution presented evidence to prove the prior convictions, and the jury found the allegations to be true. Faretta contends the court should have limited the extent of the prosecution's evidence to prove the prior convictions and should have instructed the jury that the evidence could not be considered proof of Faretta's criminal propensities.

This contention, too, is without merit. Because Faretta did not object to admission of evidence to prove the prior convictions, we need not consider the contention on appeal. (*People* v. *Johnson*, 5 Cal.App.3d 851, 863.) Moreover, the prosecution is not limited to any particular type of evidence to prove prior convictions. (*People* v. *Hill*, 67 Cal.2d 105, 122.) In any event, the limited use of evidence of prior convictions was adequately explained to the jury in this instruction:

". . .

"In this case, you must first decide the question of whether defendant is guilty of the offense charged and your consideration of that question must not be influenced by the allegation of the alleged prior conviction[s].

"If you find the defendant not guilty as to the offense charged, it will not be necessary to determine whether the allegation[s] of the prior conviction[s] [are] true. . . ."

The judgment is affirmed.

NOT FOR PUBLICATION.

/s/ Fleming
J.

We concur:

/s/ Roth
P.J

/s/ Compton
J.

IN THE COURT OF APPEAL
SECOND APPELLATE DISTRICT
STATE OF CALIFORNIA

No. 22722

S. C. No. A 012 485

THE PEOPLE, ETC., PLAINTIFF AND RESPONDENT

vs.

ANTHONY PASQUALL FARETTA,
DEFENDANT AND APPELLANT

JUDGMENT

ON APPEAL FROM THE SUPERIOR COURT IN AND FOR THE COUNTY OF LOS ANGELES

The above-entitled cause having been fully argued, submitted and taken under advisement,

IT IS ORDERED, ADJUDGED AND DECREED by the Court that the judgment is affirmed.

I, CLAY ROBBINS, JR., Clerk of the Court of Appeal, Second Appellate District, State of California. do hereby certify that the foregoing is a true copy of an original judgment entered on June 26, 1973, and now remaining of record in my office.

Dated: Aug. 27, 1973

CLAY ROBBINS, JR.
Clerk

By /s/ [Illegible]
Deputy

Order Due August 24, 1973

ORDER DENYING HEARING
AFTER JUDGMENT BY THE COURT OF APPEAL
2nd District, Division 2, Crim. No. 22722

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE

v.

FARETTA

Appellant's petition for hearing DENIED.

[Filed Aug. 22, 1973, Supreme Court,
G. E. Bishel, Clerk]

SULLIVAN
Acting Chief Justice

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. A012485

DEPARTMENT SOUTH "J"
HON. CARROLL M. DUNNUM, JUDGE

PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

VS.

ANTHONY PASQUALL FARETTA, DEFENDANT

REPORTER'S TRANSCRIPT OF APPEAL
August 2, 3, 4 & 7, 1972

APPEARANCES:

For the People:

JOSEPH J. BUSCH, JR., District Attorney
By: GEORGE S. ZUCSMITH and
ROBERT BERGER
600 Hall of Justice
Los Angeles, California 90012

For the Defendant:

RICHARD S. BUCKLEY, Public Defender
By: ARNOLD LIEMAN
402 Hall of Justice
Los Angeles, California 90012

Y. Porter, CSR
S. Boren, CSR
H. Mewes, CSR
Official Reporters
415 West Ocean Boulevard
Long Beach, California 90802

[5] LONG BEACH, CALIFORNIA, THURSDAY, JUNE 22, 1972, 9:29 A.M.

—oOo—

DEPARTMENT SOUTH "J"
HON. ELSWORTH M. BEAM, JUDGE

—oOo—

THE COURT: Let's call Anthony Pasquall Faretta.

MR. BERGER: People are ready.

THE COURT: Mr. Faretta, you moved the Court yesterday for permission to represent yourself and to relieve the Public Defender that had previously been appointed. I think you were supplied with a form that you were requested to fill out.

Have you had an opportunity to do so?

THE DEFENDANT: Yes, your Honor.

I have a document entitled, "Petition to Proceed in Propria Persona."

THE COURT: All right. Let the record show that defendant has handed to the bailiff and the bailiff has handed to the Court the document. The Court will now take a look at it.

Mr. Faretta, have you represented yourself in any other case?

THE DEFENDANT: Yes, your Honor.

THE COURT: Which case was that?

THE DEFENDANT: In 1970, your Honor, I represented myself in violation of 11910, Health and Safety Code, and 487, Penal Code.

[6] THE COURT: How did you do?

THE DEFENDANT: The 487 was dismissed, your Honor. County Jail disposition was rendered on dangerous drug offense.

THE COURT: What did you do?

Did you plea bargain in some way or were you found guilty, or what?

THE DEFENDANT: It was a plea bargain, your Honor.

THE COURT: And who bargained that for you? You did it yourself?

THE DEFENDANT: It was, yes, your Honor, and Robert Sills was the prosecuting attorney.

THE COURT: Sills, who is the District Attorney in here?

THE DEFENDANT: Yes, sir.

THE COURT: Outside of working out a deal for yourself, have you had any other court experience?

THE DEFENDANT: Well, during this time, your Honor, I filed numerous petitions. A petition to strike the prior, a petition of pretrial discovery, habeas corpus.

THE COURT: How much education have you had?

THE DEFENDANT: Well, I completed high school in the Navy, your Honor, and formally, before I enlisted in the Navy, I attended the 11th grade.

THE COURT: Tell me why you think you can do a better job defending yourself rather than somebody who has had some experience in these matters.

THE DEFENDANT: Your Honor, I am very aware that the Public Defender's Office can give you equal representation, no doubt, but I also am considering the fact that the [7] Public Defender's office is very loaded down with its, you know, a heavy case load. And given the opportunity to research my case, I can devote all the time I am in custody, being that I can't post the bail as it stands now, to my case. And I feel that, you know, I can establish the proper defense.

THE COURT: It has been my experience with pro pers that they get so busy and bogged down in making motions that they forget the basic purpose of the lawsuit and that is to win it in trial.

THE DEFENDANT: I see, your Honor.

THE COURT: They make all sorts of motions, work like the dickens, do all sorts of reading, but they seem to miss the basic purpose of what the trial is about, and that is to win it. Or if you can't win it, get a reduced sentence or do something. That has been my experience with practically every one of them. Sure, they got a lot of time. Sure, they file a lot of petitions. Yes, most of them look quite neat and legible.

But they completely neglect to consider the problem of trying the lawsuit and winning it in a trial court. The matter of evidence, direct examination, cross examination, presentation of evidence, how to do it and how to do it effectively. They overlook the fact that every time they get up in front of that jury, the jury is looking at them. Any slip, any misstatement, any strange twitch of the eye, any grimace, everything they do, the jury can see.

And, in effect, that is why pro pers, aside from the fact that they don't have the experience, get convicted many, [8] many more times than people that are represented by lawyers. No question in my mind about it. I have seen it in operation too many times. I have seen more people who represent themselves convict themselves, where if they just sat down and let somebody who knew what they were doing, do it, could well have won the lawsuit.

Just because you are going to be in jail and you have a lot of time to think up motions, to do a lot of research, doesn't mean you are going to be able to present a case in a trial court.

THE DEFENDANT: Your Honor—

THE COURT: Furthermore, there is a lot of difference between appellate practice where you can draw up petitions and make arguments and so on than trying a case. There are a lot of lawyers who are very good. They have a lot of experience in many fields and a lot of education, but they aren't any good to try a lawsuit because they haven't been in trial yet.

You have never really tried a case, have you?

THE DEFENDANT: No, your Honor. I have submitted a 1538.5 motion to the Court and when it was heard by the Court on that, also a 995 motion.

Your Honor, aside from being enamored by the novel concepts of the law, my purpose here is, essentially is to deal with this case with all expediency. I feel that, you know, the evidence that has been misconstrued and I don't want to be in jail, believe me, far less than the Public Defender wishes to see me there.

[9] And as far as the motion and the research goes, of course, this will be essential in establishing a defense. But my main objective is to dispose of the matter as promptly as I possibly can.

THE COURT: That isn't the point of disposing of the matter as prompt as you can. The point is whether you know what you are doing when you give up your right to be represented by an attorney.

THE DEFENDANT: Your Honor, I have told the Court on the occasions prior to this day that I, a layman to the law, an indigent, and I don't claim to be actually competent of defending myself, but I feel that with the Public Defender's case load and with the time I would have to reserch the cases, and with my knowledge of the case and perhaps some conflicting evidence that might make me incriminated, I feel that I could present adequate defense.

THE COURT: Do you think you could put on evidence in a more effective way than a lawyer can?

THE DEFENDANT: Not more effect, your Honor, but I feel that I could research the case to the extent to where I can find a case that parallels mine, knowing my case as it stands now.

THE COURT: Everybody thinks their case is unique and different.

What are you charged with?

THE DEFENDANT: 487, your Honor, .3.

THE COURT: What is that?

THE DEFENDANT: Grand Theft Auto.

[10] THE COURT: What is that?

THE DEFENDANT: A felony, your Honor.

THE COURT: I know, but what is the charge?

THE DEFENDANT: 487.3 of the Penal Code, Grand Theft Auto.

THE COURT: And what research do you think a lawyer is going to have to do in that? You have a lawyer who has, heaven only knows, how many cases he has tried of that kind.

That is the whole point I am making. You can spend a lot of time researching up there in the County Jail, and maybe it helps the time go faster, but like most pro

pers, it sounds to me like you are going to do all your research and lots of legal work and overlook the whole purpose of the lawsuit, really. Win it. Get the evidence. Convince the jury, at least convince them that the People don't have a case beyond a reasonable doubt, "You haven't proved it beyond a reasonable doubt."

Have you got any witnesses?

THE DEFENDANT: Yes, your Honor.

THE COURT: How are you going to get hold of them?

THE DEFENDANT: Well, your Honor, I had hoped the Court would grant me access to the law library and I can reach most of them by telephone. I did plan on having a legal runner, who is competent of doing some investigation groundwork.

THE COURT: I will take the matter under submission. My inclination is to let you—I am just telling you this—I think you are making a mistake. I haven't made my ruling yet. I am just warning you right now, I am going to give you a chance to think about it, too. There is no question in my mind that [11] you are making a mistake.

And, second, when you come in here and you try this lawsuit, you are going to be treated like a lawyer. You aren't going to be treated like a layman. You are going to be treated like a lawyer. And if you don't know your way around, that's too bad.

THE DEFENDANT: I see, your Honor.

THE COURT: You are going to follow the procedure. You are going to have to ask the questions right. If there is an objection to the form of the question and it is properly taken, it is going to be sustained. We are going to treat you like a gentleman. We are going to respect you. We are going to give you every chance, but you are going to play with the same ground rules that anybody plays. And you don't know those ground rules. You wouldn't know those ground rules any more than any other lawyer will know those ground rules until he gets out and tries a lot of cases. And you haven't done it.

I will take the matter under submission. You think it over.

My inclination is to let you have it. And I just can't understand people who try to do their own work in serious matters like this. It is one thing to paint your kitchen and another thing to try your own lawsuit.

We will take it up later.

THE DEFENDANT: Thank you, your Honor.

(Recess.)

(1:40 o'clock p.m.)

THE COURT: People versus Anthony Pasquall Faretta.

[12] Mr. Faretta, you have indicated to the Court you want to act as your own attorney and you do not want to be represented by counsel in this case; is that correct?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you understand that you have a constitutional right to a lawyer and the Court will appoint one for you, if you do not have the money to employ an attorney?

THE DEFENDANT: I do, your Honor.

THE COURT: Do you understand, in the Court's opinion you are making a very serious mistake by asking this Court to permit you to act as your own lawyer?

THE DEFENDANT: Yes, I understand your opinion, your Honor.

THE COURT: Do you understand that you are going to go by the same ground rules as any other lawyer?

THE DEFENDANT: Yes.

THE COURT: Do you understand that as far as pro per privileges are concerned, they are going to be as per Policy Memorandum of the Los Angeles Superior Court?

THE DEFENDANT: Yes, I understand that's true, your Honor.

THE COURT: And I have observed and I believe that you can read and write English, is that correct?

THE DEFENDANT: Yes, your Honor.

THE COURT: You are still desirous of doing it yourself?

THE DEFENDANT: Yes, your Honor.

THE COURT: All right. The Court is going to make a preliminary ruling in this case to the following effect:

The Court finds that the defendant has demonstrated in the courtroom, both orally and in writing, a [13] capacity to make an intelligent waiver of counsel;

The Court further finds that defendant understands that he is entitled to have a lawyer appointed to represent him and that he has made an intelligent waiver of that right.

I therefore accept the defendant's waiver of his right to counsel and grant him the right to proceed in propria persona. The rights given to the defendant while incarcerated in the Los Angeles County Jail are those set forth in Superior Court Policy Memorandum in re: Pro Per Privileges.

The Court, however, specifically reserves the right, as this matter proceeds to trial, to continually evaluate the capacity and the ability of this defendant to act as his own attorney, with the clear understanding that if at any time it becomes apparent to the Court that the defendant cannot act as his own attorney, his pro per status will be revoked and an attorney will be appointed to represent him.

I call your attention to the notice requirements that are set forth in the various code sections with respect to motions, and I am going to require you to follow them. Specifically, I am going to require you to notice all motions ten days in advance of this hearing and file them in the court and serve a copy on the District Attorney. I am going to require specifically that all pretrial motions be noticed for hearing at least ten days prior to the date set for the trial time.

THE DEFENDANT: Yes, your Honor.

THE COURT: I don't expect you to come in with a large [14] group of motions on the day of the trial that should have been noticed and heard at least ten days prior thereto, because I am not going to consider them.

Do you understand?

THE DEFENDANT: Yes, your Honor.

THE COURT: Now, have you as yet received a copy of the preliminary transcript and the Information from the Public Defender?

THE DEFENDANT: No, I haven't, your Honor.

THE COURT: All right.

Does anyone know where the Public Defender is that was on this case?

MR. BERGER: That is Mr. Lieman's case.

MR. PECK: I assume Mr. Lieman is in his office, your Honor. Perhaps the Clerk can call up there.

THE COURT: Here he is now.

Mr. Lieman, do you have the copy of the preliminary transcript and the copy of the Information that you can deliver to the defendant at this time?

MR. LIEMAN: I will have to go to my office and get it, your Honor. I shall do that.

THE COURT: All right.

If you will get it and deliver it to him. We will have to bring the defendant out later so that the record will show that it has been received.

MR. LIEMAN: Your Honor, it will take me about two minutes to get my transcript.

THE DEFENDANT: Your Honor?

[15] THE COURT: Yes.

THE DEFENDANT: If I might get a date set for a pretrial discovery motion; and, also, I would like to again be heard on the subject of bail reduction.

THE COURT: I will hear you on the subject of the bail motion very briefly now. I will give you about five minutes. If it is going to take longer than that, if you run out of time, I will have to hear it later.

Go ahead.

THE DEFENDANT: I will try to be as brief as possible, your Honor.

At the time I was arrested, I was an outpatient at the Harbor General Hospital. And I am now receiving treatments at the County Jail. But I don't know, the inadequacies of the County facilities, but my condition hasn't improved any.

Now, I have an outpatient card for the Harbor General Hospital. And I was also going to El Cerritos Hospital for dental work.

I have been staying in Long Beach for eight years, your Honor, and I have never failed to make a court appearance. As you can see, on the O.R. application, I have had numerous occasions before, when I possibly could have failed to make a court appearance.

Mr. Alemon spoke, I believe, and he will try to help me to use most of my time on the street constructively with the Citizen's Rehabilitation Program. I don't know to what depth he spoke to you on the subject but I am very interested in becoming more involved in Mr. Alemon's program.

[16] Presently $2000 bail is a little bit beyond my means, quite a lot beyond my means. At the time I was arrested, I was working as a meat cutter, journeyman meat cutter and making a sum of money that would enable me to hire an attorney, private attorney, which I would be desirous to do, your Honor.

If you could consider the matter of a bail reduction and possibly to $500, I am certain that I could now raise this sum of money and post bail.

I have been staying in the Long Beach area or in Orange County near Mr. Alemon's. Mr. Alemon has indicated to me that he may be able to find some sort of temporary work until the union can get me back to work as a butcher. I have worked for Max's Quality Meats, and you see on that O.R. application, but it was just a union job that they had sent me out for a day. But he did indicate that he might be able to take on permanent help.

At any rate, your Honor, I would be endeavoring to find permanent work while I was out on bail and to hire a private attorney.

I would ask the Court to consider $500, since I feel that this sum is within reason.

THE COURT: Motion is denied.

One other point I want to make and then we will let you go, say, within the next 30 days or so, you decide to request the Court to be relieved of acting as

your own attorney, I will entertain that motion and I will grant it and I will appoint the Public Defender again. But after that time, especially at the time of trial, if you come up and you say, [17] "Well, I have thought it all over and I have decided I would rather have a lawyer," it is too late. I am telling you right now I am going to deny it.

Do you understand?

THE DEFENDANT: Yes, your Honor. I appreciate your consideration.

MR. LIEMAN: Your Honor, I have a copy of the preliminary hearing transcript and a copy of the Information; I will turn it over to Mr. Faretta.

THE COURT: Do you acknowledge receipt of the copy of the transcript of the preliminary hearing?

MR. LIEMAN: I will ask him to sign a receipt.

THE COURT: Very well.

MR. LIEMAN: Your Honor, I came in at the tail end of this. Are we being relieved in this matter?

THE COURT: Yes, as soon as you deliver all the documents.

I am not going to wait for him to sign the receipt.

What else, how about a copy of the Information?

MR. LIEMAN: It is in the transcript, contained in the copy of the preliminary transcript, your Honor.

THE COURT: Do you acknowledge receiving a copy of the Information, Mr. Faretta?

Do you acknowledge receiving a copy of it?

THE DEFENDANT: Yes, your Honor.

THE COURT: Now, do you have any other documents to deliver?

MR. LIEMAN: No, your Honor, nothing pertaining to this case.

[18] THE COURT: Very well. The Public Defender is relieved.

THE DEFENDANT: Your Honor, at this time I would like to make the Court aware that I am an indigent and that I am sort of financially disabled now, but if the Court would be so graceful as to provide some legal paper, some pencils and perhaps a folder to get the case started, I could then provide my own supplies.

THE COURT: You are referred to the Pro Per Policy Memorandum. You may proceed under that.

The Clerk is ordered to file the defendant's petition to proceed in propria persona.

THE BAILIFF: Do we have a trial date?

MR. BERGER: Yes. It was August 2nd.

THE COURT: The trial date is August 2nd at 9:00 a.m. in this department.

THE DEFENDANT: May I have a date set for motion for pretrial discovery, your Honor?

THE COURT: All right. Why don't you put it in writing and give us some idea what it is all about.

THE DEFENDANT: Well, I would like a copy of the complaint, felony, the complaint that was issued by the plaintiff and also arrest report and—

THE COURT: That is a discovery motion. Put it in writing and send it down. Give everybody ten days notice.

I am just telling you right now, follow the procedures. I am a judge. I am not a lawyer and I don't give legal advice. I don't see how a judge can give both sides a fair trial on the one hand and act as a lawyer on the other.

[19] MR. BERGER: Your Honor, the Public Defender has already been furnished with copies of the complaint, the police report, and various other documents.

MR. LIEMAN: Excuse me, your Honor. I realize in looking through the file, we do have a copy of the police report; and I will be glad to turn it over to the defendant at this time.

THE COURT: Very well.

MR. BERGER: Let's put in the record what you are giving him so that we won't ask for it again.

MR. LIEMAN: I am handing Mr. Faretta a copy of the police report, which contains some eight pages and also a copy of the O.R. report, which recommended that defendant be denied O.R. release. I am giving it to him at this time.

Those are all of the records that I have pertaining to this case, your Honor.

MR. BERGER: No copy of the complaint in your files?

MR. LIEMAN: I am sorry. There is a copy of the complaint also. That is all I have.

THE COURT: Mr. Faretta, do you acknowledge receipt of the documents mentioned by the Public Defender?

THE DEFENDANT: Yes, your Honor, I do.

THE COURT: Very well. If you have anything further, you can notice it and we will take care of it.

THE DEFENDANT: Your Honor, the defense would request a copy of the transcript of this particular hearing.

THE COURT: Motion denied.

THE DEFENDANT: Thank you, your Honor.

(The matter was continued for further proceedings as afore indicated.)

[20] LONG BEACH, CALIFORNIA,
THURSDAY, JULY 13, 1972, 9:40 A.M.

—oOo—

THE COURT: In the Faretta matter, I brought you back down here to do some reconsideration as to whether or not you should continue to represent yourself.

How have you been getting along on your research?

THE DEFENDANT: Not bad, your Honor.

Last night I put in the mail a 995 motion and it should be with the Clerk within the next day or two.

THE COURT: Have you been preparing yourself for the intricacies of the trial of the matter?

THE DEFENDANT: Well, your Honor, I was hoping that the case could possibly be disposed of on the 995.

Mrs. Ayers informed me yesterday that it was the Court's policy to hear the pretrial motions at the time of trial. If possible, your Honor, I would like a date set as soon as the Court deems adequate after they receive the motion, sometime before trial.

THE COURT: Let's see how you have been doing on your research.

How many exceptions are there to the hearsay rule?

THE DEFENDANT: Well, the hearsay rule would, I guess, be called the best evidence rule, your Honor. And there are several exceptions in case law, but in actual statutory law, I don't feel there is none.

THE COURT: What are the challenges to the jury for cause?

THE DEFENDANT: Well, there is twelve peremptory [21] challenges.

THE COURT: And how many for cause?

THE DEFENDANT: Well, as many as the Court deems valid.

THE COURT: And what are they? What are the grounds for challenging a juror for cause?

THE DEFENDANT: Well, numerous grounds to challenge a witness—I mean, a juror, your Honor, one be-

ing the juror is perhaps suffered, was a victim of the same type of offense, might be prejudiced toward the defendant. Any substantial ground that might make the juror prejudice toward the defendant.

THE COURT: Anything else?

THE DEFENDANT: Well, a relative perhaps of the victim.

THE COURT: Have you taken a look at that code section to see what it is?

THE DEFENDANT: Challenge a juror?

THE COURT: Yes.

THE DEFENDANT: Yes, your Honor. I have done—

THE COURT: What is the code section?

THE DEFENDANT: On voir diring a jury, your Honor?

THE COURT: Yes.

THE DEFENDANT: I am not aware of the section right offhand.

THE COURT: What code is it in?

THE DEFENDANT: Well, the research I have done on challenging would be in Witkins Jurisprudence.

THE COURT: Have you looked at any of the codes to see where these various things are taken up?

[22] THE DEFENDANT: No, your Honor, I haven't.

THE COURT: Have you looked in any of the California Codes with reference to trial procedure?

THE DEFENDANT: Yes, your Honor.

THE COURT: What codes?

THE DEFENDANT: I have done extensive research in the Penal Code, your Honor, and the Civil Code.

THE COURT: If you have done extensive research into it, then tell me about it.

THE DEFENDANT: On empaneling a jury, your Honor?

THE COURT: Yes.

THE DEFENDANT: Well, the District Attorney and the defendant, defense counsel, has both the right to 12 peremptory challenges of a jury. These 12 challenges are undisputable. Any reason that the defense or prosecution should feel that a juror would be inade-

quate to try the case or to rule on a case, they may then discharge that juror.

But if there is a valid challenge due to grounds of prejudice or some other grounds, that these aren't considered in the 12 peremptory challenges. There are numerous and the defendant, the defense and the prosecution both have the right to make any inquiry to the jury as to their feelings toward the case.

THE COURT: The Court having observed the conduct and the demeanor of the defendant, in addition to what he said, does not believe that the defendant has made an intelligent and knowing waiver of his constitutional right to be represented by an attorney. Also taking into consideration the recent case [23] of People versus Sharp, where the defendant apparently does not have a constitutional right to represent himself, the Court finds that the ends of justice and requirements of due process require that the prior order permitting the defendant to represent himself in pro per should be and is hereby revoked. That privilege is terminated.

The Public Defender is appointed to represent the defendant in this case.

The District Attorney is ordered to deliver to the Public Defender's Office forthwith a copy of the Information in this case.

The defendant is ordered to deliver to the Public Defender a copy of the preliminary transcript in this case, and in the event the defendant neglects, fails, or refuses to deliver a copy of the transcript of the preliminary hearing in this case, the Public Defender may make the request of the Court and the Court will order an additional copy of the transcript of the preliminary hearing.

THE DEFENDANT: Your Honor—

THE COURT: Anything further?

MR. BERGER: Might I just say for the record, your Honor, that it is my understanding that a copy of the Information has been furnished to the defendant already. Perhaps that might be made part of the order that the Court has directed to the defendant.

THE COURT: That was a part of the order, and I hereby direct you and order you to deliver the copy of

the transcript of the preliminary hearing heretofore given to you by the [24] Public Defender, I order you to return it to the Public Defender.

THE DEFENDANT: Your Honor, if I might again be heard on the matter. According to the Sixth Amendment, a defendant has the right to assistance of counsel of his choice, and I believe those are the words that are used, when I say "assistance."

Now, if the Court would find it appropriate that defendant act as co-counsel in this matter, I would then move that the Court would make that order.

THE COURT: Defendant's motion to act as co-counsel, that is my understanding of your motion, is denied.

THE DEFENDANT: Your Honor, one more matter, then. Being that the defendant, the defendant discharged the Public Defender's Office in this matter, I feel that the Public Defender would be biased and prejudiced toward the defendant's case and would therefore, under Section 987(b) of the Penal Code, move that the Court appoint him an attorney.

THE COURT: Defendant's motion is denied.

THE DEFENDANT: Your Honor, I would then ask the Court if I might have a transcript of this hearing.

THE COURT: You make a showing through your attorney, and it will be given to you, but you don't represent yourself any more.

Anything else?

THE DEFENDANT: If this is the order of the Court, I understand, your Honor.

THE COURT: All right.

MR. BERGER: The trial date remains at August 2nd, your [25] Honor?

THE COURT: Yes.

-oOo-

[26] LONG BEACH, CALIFORNIA, WEDNESDAY, AUGUST 2, 1972, 2:00 P.M.

DEPARTMENT SOUTH "J"
HON. CARROLL M. DUNNUM, JUDGE

(The following proceedings were had in open court out of the presence of the prospective jurors:)

THE COURT: People versus Anthony Pasquall Faretta.

MR. ZUGSMITH: People are ready.

MR. LIEMAN: Ready for the Defendant.

THE COURT: The record will show that the Defendant and both attorneys are present at the counsel table. The matter is before the Court for hearing of Defendant's motion for dismissal under the provisions of 995 of the Penal Code.

You may argue your motion, counsel. The Court has read and considered the transcript of the preliminary hearing in its entirety.

MR. LIEMAN: Yes, your Honor. The Defendant would ask the Court to also consider the case of People versus Rogers, 4 Ca Ap 531, which was cited in our points and authorities.

In this particular matter the Defendant was held to answer based upon the testimony of the owner of the car, Mrs. Telford, to the effect that, as far as she knew, her husband had reported the car stolen.

However, there was no testimony to show Mr. Telford's whereabouts, if he had granted anyone permission to move the car or given anyone permission to move it whatsoever.

In the Rogers case the court in that case in reversing the conviction indicated that they would have to show [27] that the driver of the car lacked consent of the owner, and in that case, also, one party testified and not the other one.

I would submit that this case is exactly in point with People versus Rogers and ask the Court to dismiss it on that basis.

MR. ZUGSMITH: May I respond, your Honor?

THE COURT: Yes.

MR. ZUGSMITH: People versus Rogers is a case in which a submission on the transcript occurred subsequent to the preliminary hearing.

In the matter that is presently before the Court there has been no submission on the transcript. In People versus Rogers the reversal was predicated upon the court trial that grew out of the submission on the transcript.

Here we have a preliminary hearing with the wife of the owner testifying at the preliminary hearing, creating a strong suspicion respecting the element of lack of consent and no knowledge or permission granted to the Defendant and no indication that anyone in the immediate family of the owner knew the Defendant.

I submit, your Honor, that based upon the transcript, as it stands before the Court, the Court did have a strong suspicion both that the Defendant had committed the crime and that the crime had been committed.

We submit it, your Honor.

THE COURT: We are dealing with a question of fact. The Magistrate did find that there was sufficient evidence to bind the Defendant over for trial. The Court agrees with the [28] Magistrate.

The motion is denied. This is a jury trial?

MR. LIEMAN: That is correct, your Honor.

THE COURT: Call for a jury, please.

THE DEFENDANT: Your Honor—

MR. ZUGSMITH: Your Honor, prior to the panel's arrival the People would move to amend the information. I have discussed this matter prior to today with Mr. Lieman. We would like to amend the information to allege the priors.

THE COURT: You have been advised heretofore of the intention of the People to amend to allege priors?

MR. LIEMAN: That's correct, your Honor.

THE COURT: The motion is granted. You may amend.

MR. ZUGSMITH: Thank you, your Honor. At this time your Honor, I am handing the original copy of the amended information to the clerk. The People did give the

Defendant's copy yesterday to the Defense attorney, Mr. Lieman.

Is that correct, Mr. Lieman?

MR. LIEMAN: That is true.

MR. ZUGSMITH: Mr. Faretta, at this time the People seek to and have been granted the opportunity to amend the information to allege prior convictions against you. There are several prior convictions in the amendment.

However, the People at this time would move to amend the information to charge that on the date of November 30th, 1965 in the Superior Court of the State of California, for the County of Los Angeles, you were convicted of the crime of violation of Section 11530 of the Health and Safety Code, [29] a felony.

In addition, to that, Mr. Faretta, on the date of May 5th, 1967, in the Superior Court of the State of California, for the County of Orange, you were convicted of the crime of violation of Section 11530 of the Health and Safety Code, a felony.

In addition to that Mr. Faretta, on the date of March 25th, 1970, in the Superior Court of the State of California for the County of Los Angeles, you were convicted of the crimes of violation of Section 487.3 of the Penal Code and Section 10851 of the California Vehicle Code, both felonies.

MR. LIEMAN: Excuse me. Are we disregarding the first alleged prior?

MR. ZUGSMITH: Yes.

MR. LIEMAN: Thank you.

MR. ZUGSMITH: To those prior allegations, Mr. Faretta, do you admit or deny those?

THE DEFENDANT: I deny them on their face.

THE COURT: Mr. Faretta, you realize that by your denial the Court must, when reading the information to the jury, advise the jury of these alleged priors and your denial thereof?

THE DEFENDANT: Your Honor, the Defendant at this time denies the priors on their face for the Court to determine the nature of the crimes as they were deemed here as felonies. This is the basis of the Defendant's denial.

THE COURT: You did not answer my question. I merely asked you if you realize that by your denial of these priors—and if they are not proper priors you should deny them.

[30] But the question I am directing to you is: Do you realize that by your denial of the priors that I must advise the jury of the alleged priors and your denial thereof, because they are the ones that are going to make the finding on the priors?

THE DEFENDANT: Yes, your Honor.

THE COURT: Very well.

THE DEFENDANT: Your Honor—

THE COURT: Now, what is the situation with the first alleged prior paragraph?

MR. ZUGSMITH: I have examined the official documentation respecting that prior, your Honor, and I have made a determination that apparently that prior was handled at the misdemeanor level.

THE COURT: So that will not be read then?

MR. ZUGSMITH: That's right.

THE COURT: Very well.

MR. ZUGSMITH: With respect to the November 30th, 1965 prior, a violation of section 11530, your Honor, I had one of our District Attorney investigators go downtown and retrieve what was supposed to be the official file.

I have gotten the file back and apparently it is not the correct file. There is an error in clerical work somewhere.

I do believe the Defendant did suffer that conviction in 1965. I am attempting to get the official court file. However, I do not have it at this time.

MR. LIEMAN: I would hesitate to have that read to the [31] jury with the possibility that it might very well be a misdemeanor.

THE COURT: Do you wish to withdraw that alleged prior?

MR. ZUGSMITH: Well, your Honor, in 1965 a conviction of 11530 was a straight felony, as I understand it. I don't think it was a misdemeanor at that time or could be a misdemeanor.

THE COURT: Very well. We will await the arrival of the jury for the commencement of the trial.

THE DEFENDANT: Your Honor, if the Defendant might be heard—

THE COURT: Speak through your attorney, please.

THE DEFENDANT: Well, your Honor, prior to, I believe it was, July 14th the Defendant was appearing in pro per, and I was brought to the court on a competency hearing in which the court found me incompetent, using as a basis People versus Sharp, which I believe is such a recent case that the Federal Reporter hasn't even—

THE COURT: I am very well aquainted with the Sharp case. I handled it.

THE DEFENDANT: Prior to the competency hearing the Public Defender had been dismissed, and I motioned at that time to Judge Beam that perhaps a conflict would arise out of this because the Public Defender was discharged and the same Public Defender was reappointed.

On that question of competency of Mr. Lieman—in fact, I am sure he is a very competent attorney, but I have talked to Mr. Lieman and in my opinion there is a definite conflict of interests here, and I would ask the Court, under Section 987 of the Penal Code, to appoint me a state appointed [32] counsel.

THE COURT: This matter has been handled by Judge Beam heretofore. I am not going to second guess Judge Beam.

Motion denied. Has the jury arrived? It looks like there are people out there.

THE BAILIFF: I will check, your Honor.

(The following proceedings were had in open court in the presence of the prospective jurors:)

THE COURT: People versus Anthony Pasquall Faretta. Both sides ready?

MR. ZUGSMITH: People are ready.

MR. LIEMAN: Defendant is ready.

THE COURT: Swear the panel, please.

THE CLERK: Will the prospective jurors rise, please, and raise your right hand?

You and each of you do solemnly swear that you will well and truly answer such questions as may be asked of you, touching upon your qualifications to act as trial jurors in the cause now pending before this court?

(The prospective jurors indicated in the affirmative.)

THE CLERK: As I call your name, would you step forward, please, to the bailiff.

Richard D. Koffroth, K-o-f-f-r-o-t-h.

Norman Rogers, R-o-g-e-r-s.

Mrs. Betty L. Johnston, J-o-h-n-s-t-o-n.

Mrs. Mildred M. Wynn, W-y-n-n.

[33] Mrs. Marie M. Taylor, T-a-y-l-o-r.

Isiah Ross, R-o-s-s.

Betty J. Snyder, S-n-y-d-e-r.

Mrs. Frances V. Smith, S-m-i-t-h.

Mrs. Lorraine G. Sundstrom, S-u-n-d-s-t-r-o-m.

Mrs. Helen C. Johnson, J-o-h-n-s-o-n.

Donald R. Jensen, J-e-n-s-e-n.

Thomas R. Thompson, Jr., T-h-o-m-p-s-o-n.

THE COURT: Good Afternoon, ladies and Gentlemen.

If those of you on the other side of the rail would listen to the voir dire examination as it is conducted, if, as and when you are called into the jury box, we may shorten proceedings by merely asking you if you have heard what has go on heretofore and if your answers to the questions that have been directed to the jurors in the box would be substantially the same as the answers heretofore given.

We have for trial this afternoon the case of the People of the State of California versus Anthony Pasquall Faretta. The information in this matter alleges that on or about May 21st, 1972, or between that date, May 21st, 1972, and May 22nd, 1972 the Defendant in the County of Los Angeles, State of California, did willfully, unlawfully, feloniously take a certain motor vehicle, to wit, an automobile then and there the personal property of one Dean H. Telford.

The Defendant has pleaded not guilty to the charge. The information also alleges that before the commission of the offense just stated to you that the Defendant,

Anthony Pasquall Faretta, under the name of Lawrence E. Ricchio, was on or about [34] the 30th day of November, 1965, in the Superior Court of the State of California, for the County of Los Angeles, convicted of the crime of violation of Section 11530 of the Health and Safety Code, a felony.

The information further alleges that before the the commission of the offense heretofore read to you that the Defendant, Anthony Pasquall Faretta, under the name of Anthony P. Faretta, was on or about the 5th day of May, 1967, in the Superior Court of the State of California, for the County of Orange, convicted of the crime of violation of Section 11530 of the Health and Safety Code, a felony.

The information further alleges that on or before the commission of the offense heretofore read to you that the Defendant, Anthony Pasquall Faretta, under the name of Anthony P. Faretta, was in the Superior Court of the State of California, for the County of Los Angeles, convicted of the crimes of violation of Section 487.3 of the Penal Code and Section 10851 of the Vehicle Code, both felonies.

To each of these alleged prior convictions the Defendant has denied the validity thereof.

(Voire dire of prospective jurors.)

THE COURT: Peremptory is with the People.

MR. ZUGSMITH: People accept the panel, your Honor.

THE COURT: Peremptory with the Defense.

MR. LIEMAN: The Defendant would accept the panel.

THE COURT: Swear the jury.

THE CLERK: Will the jurors in the box rise and raise your right hand.

[35] You and each of you do solemnly swear that you will well and truly try the cause now pending before this court and a true verdict render therein according to the evidence and the instructions of the court, so help you God?

(The jurors indicated in the affirmative.)

THE COURT: The balance of the jury panel may return to the jury assembly room. Thank you for coming in.

Opening statement for the People.

(Opening statement.)

THE COURT: Opening statement for the Defense.

MR. LIEMAN: May we reserve it, your Honor, at this time?

THE COURT: Very well. Ladies and gentlemen of the jury, it is your duty not to converse with or suffer yourselves to be addressed by any other persons on any subject of the trial, or to form or express an opinion thereon until the case is finally submitted to you.

May we have a stipulation that this admonition is deemed given at the beginning of each recess?

MR. LIEMAN: So stipulated.

THE COURT: Mr. Zugsmith?

MR. ZUGSMITH: So stipulated, your Honor.

THE COURT: May we have a further stipulation that all twelve jurors are present in the jury box and that the Defendant and both attorneys are present at the counsel table at the beginning of each session unless my attention is directed to some omission?

MR. ZUGSMITH: So stipulated for the People.

MR. LIEMAN: So stipulated for the Defendant.

[36] THE COURT: We will be in recess until ten o'clock tomorrow morning. Good night.

(At 4:30 p.m. an adjournment was taken until Thursday, August 3, 1972 at 10:00 a.m.)

[37] LONG BEACH, CALIFORNIA, THURSDAY, AUGUST 3, 1972, 11:00 A.M.

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(The following proceedings were had in open court out of the presence of the jury:)

THE COURT: Do I understand that there is a motion in the Faretta case?

MR. LIEMAN: I would like to make a motion before the jury comes in.

THE COURT: All right. Keep the jury out. Bring Mr. Faretta in, please.

The record will show that the Defendant and both attorneys are present at the counsel table. The jurors are not in the courtroom.

I understand there is a motion in this case.

MR. LIEMAN: Your Honor, rather than a motion, Mr. Faretta has indicated to me that he was rather unhappy with the representation he has been receiving, and I suggested that if he is so unhappy that he make his complaints known to the Court and that he put it on the record prior to the jury being present.

As he asked yesterday, he requested that another attorney be appointed.

THE DEFENDANT. Your Honor, the main reason I have stated this conflict is that Judge Beam dismissed the Public Defenders Office, you know, being that I wasn't satisfied with the representation I was getting.

At that time I had appealed to the court under the 987 to appoint counsel. The Judge said this was impossible.

I then motioned that I be granted pro per status, [38] which he did grant. As the Court knows, later through the competency hearing I was denied the right to defend myself, and the Court reappointed Mr. Lieman.

Now, whether Mr. Lieman has any ill will about this or not, who am I to say?

But I feel that if it was myself in Mr. Lieman's position, I would suffer some embarrassment from this situation.

THE COURT: This is the second time now that you have raised this issue in two days. I have denied this motion yesterday on your part.

There was a hearing held on July 13, 1972 wherein Judge Beam did determine that you were not qualified to represent yourself.

I am not going to second guess Judge Beam in this regard. I know Mr. Lieman is a very qualified lawyer and, if you would cooperate with him, you will get good representation far over and beyond anything that you could do on your own behalf.

So the previous ruling of Judge Beam on July 13th and my ruling of yesterday are affirmed. I again deny the motion.

Bring the jury out, please

(The following proceedings were had in open court in the presence of the jury:)

THE COURT: The record will show that all twelve jurors are present in the jury box. The Defendant and both attorneys are present at the counsel table.

I believe yesterday we had selected the jury, sworn [39] the jury, had opening statement by the People, and opening by the Defense was reserved.

First witness by the People.

MR. ZUGSMITH: Thank you, your Honor. People call Dean Telford to the stand.

MR. LIEMAN: Your Honor, there would be a Defense motion to exclude any other prosecution witnesses that are in the courtroom.

THE COURT: All witnesses who intend to testify in this matter are requested to step out into the vestibule and are ordered not to converse one with the other concerning this case until after the conclusion of the trial.

The investigating officer and the Defendant may remain.

Are all witnesses out of the courtroom now?

MR. ZUGSMITH: Yes, your Honor, I believe so.

THE COURT: Mr. Lieman, are all of your witnesses out, too?

MR. LIEMAN: Yes, your Honor.

THE CLERK: Raise your right hand to take the oath.

You do solemnly swear that the testimony you may give in the cause now pending before this court shall be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

• • • •

[224] CROSS-EXAMINATION

BY MR. ZUGSMITH:

• • • •

[234] Q Let me ask you this: Mr. Faretta, at one time in the court of this case you were permitted by a Judge of the Superior Court to represent yourself; do you recall that?

[235] A Yes.

Q During that period of time you were in custody; is that correct?

A I was in custody and have been.

Q During that time in your participation and representing yourself you summoned me to the jail; isn't that correct?

A I summoned you to the jail?

Q Yes. Didn't you call for the District Attorney to come up?

A No.

Q Did you ever talk to a District Attorney in jail?

A I spoke to a District Attorney here on a court appearance on one occasion.

Q Did you ever talk to a District Attorney while you were in jail?

A If you consider my present state in jail, yes, I have talked to one.

Q I am talking about down on 4D. You remember that day on 4D, don't you, sir? Don't you remember that you asked to see a District Attorney or District Attorneys? You remember that, sir, don't you?

A Yes, I recall that situation.

Q And you remember that some District Attorneys came to see you; isn't that correct?

A Yes, I recall seeing you and—I recall seeing yourself, George Zugsmith, and Robert Berger.

Q At that time Mr. Berger told you, did he not, sir, that he was the Calendar Deputy for this particular court; is [236] that correct?

A Yes, I believe that is what he did say.

Q And he introduced me, didn't he?

A Yes, he did.

Q And he told you that I was one of the trial Deputies assigned to this court; isn't that correct?

A Assigned to my case, yes.

Q And then we had a conversation, Mr. Berger and yourself and me; is'nt that right?

A That's correct, yes.

Q At no time during that conversation did you ever mention what you just told this jury, did you?

MR. LIEMAN: I am going to object. I think that this is grounds for mistrial. Certainly if the Defendant is in pro per, he is representing himself. There is nothing wrong with that. The Defense attorneys talk to Defendants. I do it every day and Mr. Zugsmith does it every day in behalf of the District Attorney.

THE WITNESS: Your Honor, I would join in an objection.

MR. LIEMAN: I think that is an improper subject for cross-examination.

THE COURT: The Court will exclude it under 352 of the Evidence Code.

MR. ZUGSMITH: Thank you, your Honor.

MR. LIEMAN: I also made a motion for mistrial.

THE COURT: Denied. The jury is instructed to disregard the questions and answers concerning the meeting between the District Attorney and the Defendant while he was in custody here [237] in this building.

MR. ZUGSMITH: Thank you, your Honor. I will enter another area of cross-examination.

Q BY MR. ZUGSMITH: Mr. Faretta, at the time that you were stopped by Officer Edwards I think you indicated that you had been drinking prior to that time?

A Yes, I had been.

Q How much had you had to drink just prior to the time or prior to the time that Officer Edwards stopped you?

A Well, the hotel I stay in, you know, caters to alcoholics in particular, because it is more or less, well, half way or to keep people from backsliding, but it seems it has the adverse effect.

I drank about two fifths of wine.

Q Had you had any beer to drink that night?

A No.

Q Did you hear Officer Edwards testify that there were several empty beer cans in the car that you had been driving?

A Yes. I noticed. I didn't have a chance to clean the car out.

Q Do you know how those got in there?

A No, I don't.

Q Were those empty cans in the car when you allegedly purchased it?

A Yes, they were.

Q Did you feel that you were drunk at the time that Officer Edwards stopped you?

A If the Officer was going to testify that I wasn't [238] drunk, I certainly feel that I was not in fact drunk.

Q Were you in possession of your faculties?

A Yes.

• • • •

[283] LONG BEACH, CALIFORNIA, TUESDAY, SEPTEMBER 5, 1972

• • • •

[297] THE DEFENDANT: Yes, your Honor. I'd appeal to the grace of the Court at this time to post a bail on that appeal and make notice of motion. Now, Mr. Lieman advised me that he is already in the process of filing notice.

THE COURT: Let's handle one thing at a time.

Do you understand that unless your present lawyer [298] is going to file a Notice of Appeal for you, it is your duty to file your own Notice of Appeal, and this must be done within sixty days from today?

THE DEFENDANT: Yes.

THE COURT: Do you have any questions you want to ask me about your appellate rights?

THE DEFENDANT: I understand I have ten days to file notice.

THE COURT: No. You have sixty days within which to file your Notice of Appeal. That time starts to run from today.

Do you have any other questions concerning your appellate rights?

THE DEFENDANT: Concerning my appellate rights, no, your Honor, other than that question I posed in regards to the bail.

THE COURT: The reporter is ordered to have a transcript of these proceedings prepared, certified, and filed with the Clerk of this court.

Now, what was the item you just mentioned? Talk through Mr. Lieman.

MR. LIEMAN: Your Honor, we will file a Notice of Appeal on behalf of Mr. Faretta, and he has requested that the Court set bail on the appeal.

THE COURT: Well, in view of the defendant's record and the sentence of the Court—

MR. BERGER: May I be heard before the Court announces a figure?

[299] THE COURT: Yes.

MR. BERGER: As the Court knows, on felony matters, the right to bail is discretionary. The defendant has no absolute right to bail, and the Court may impose no bail, that is, not set a bail if the Court deems it appropriate.

I did not handle the trial, although I am familiar with the facts in the case having persued the District Attorney's file.

It appears to me, your Honor, that the evidence of guilt is overwhelming. It also appears—unless Mr. Lieman or the Court indicates to the contrary—that there was no apparent error in the trial.

I would therefore suggest to the Court that the chance of reversal is so minimal as to justify the setting of no bail in this case.

THE COURT: Well, that was what I was about to say.

MR. BERGER: Thank you, your Honor.

THE COURT: The motion for bail pending appeal is denied.

MR. LIEMAN: Your Honor, Mr. Faretta indicates that he would request the Court send him to Department 95 at this point for observation or diagnostic study.

THE COURT: The Court sees no grounds for such a motion. Denied.

THE DEFENDANT: Your Honor, if I might be heard on the matter briefly.

THE COURT: Well, talk through Mr. Lieman, please. You could say things that could be harmful to your position.

MR. LIEMAN: Your Honor, Mr. Faretta indicates that he [300] had had several convictions in the past for dangerous drugs and that he feels at the time of the arrest, there was some dangerous-drug involvement in this particular case which the Court just sentenced him on, and that was his reason for his desiring to be sent to Department 95.

THE COURT: Well, the Court sees no basis for such a referral.

Denied.

—oOo—

SUPREME COURT OF THE UNITED STATES

No. 73-5772

ANTHONY PASQUALL FARETTA, PETITIONER

v.

CALIFORNIA

On petition for writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

March 18, 1974

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-5772

ANTHONY PASQUALL FARETTA,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1973

NO. 73-5772

ANTHONY PASQUALL FARETTA,
Petitioner,
v.
PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

On June 26, 1973, the California Court of Appeal, Second Appellate District, Division Two, rendered an unpublished opinion affirming the guilt of petitioner as to one count of grand theft, a violation of section 487, subdivision 3, of the California Penal Code.

On July 16, 1973, a petition for rehearing was denied by the California Court of Appeal and on August 22, 1973, a petition for hearing was denied by the California Supreme Court, both without opinion.

JURISDICTIONAL STATEMENT

Petitioner states that the court has jurisdiction in this matter based upon "the mandatory provisions of section 1257(3) of the United States Code as annotated."

QUESTIONS PRESENTED

Petitioner raises the following questions:

1. Does a defendant have the absolute right to defend himself at trial under the Sixth Amendment to the United States Constitution?

2. Was petitioner denied his right to compel the attendance of witnesses?

STATEMENT OF THE CASE

In an information filed by the District Attorney of Los Angeles County, petitioner was charged with grand theft, a violation of section 487, subdivision 3, of the California Penal Code. (Cl. Tr. p. 1.) Additionally, prior convictions were alleged. (Cl. Tr. p. 2.)

A public defender was appointed to represent petitioner. Petitioner pleaded not guilty. (Cl. Tr. p. 3.) The public defender was relieved, and petitioner's motion to appear in propia persona was granted. (Cl. Tr. p. 4.)

Petitioner's pro per status was revoked, and the public defender was appointed to represent him. (Cl. Tr. p. 7.)

Petitioner's motion under section 995 of the California Penal Code was denied. (Rep. Tr. p. 28.) Petitioner denied the prior convictions. Trial was by jury. (Cl. Tr. p. 9.)

Petitioner was found guilty as charged. (Cl. Tr. p. 47.) The alleged prior convictions were found to be true. (Cl. Tr. pp. 48-51.)

The court struck the prior convictions. Probation was denied, and petitioner was sentenced to the state prison for the term prescribed by law. (Cl. Tr. p. 55.)

Petitioner appealed from the judgment of conviction. (Cl. Tr. p. 56.)

On June 26, 1973, the California Court of Appeal, Second Appellate District, Division Two rendered an unpublished opinion affirming the guilt of petitioner as to one count of grand theft, a violation of section 487, subdivision 3, of the California Penal Code.

On July 16, 1973, a petition for rehearing was denied by the California Court of Appeal and on August 22, 1973, a petition for hearing was denied by the California Superior Court, both without opinion.[1/]

ARGUMENT

I

THE TRIAL COURT HAD THE RIGHT TO REVOKE PETITIONER'S "PRO PER" STATUS AND A DEFENDANT DOES NOT HAVE THE ABSOLUTE RIGHT TO DEFEND HIMSELF

Petitioner contends that he had an absolute right to represent himself at the criminal proceedings concerning him. (Petn. pp. 14-20.)

In the case at bar, the court initially granted petitioner's motion to represent himself. (Rep. Tr. pp. 12-14.)

Subsequently, the court again questioned petitioner pursuant to a determination as to whether he was competent to represent himself. When asked how many exceptions there were to the hearsay rule, petitioner answered that the hearsay rule could best be called the best evidence rule, and that there were no exceptions. (Rep. Tr. p. 20.) The court asked petitioner other questions concerning his ability to represent himself. (Rep. Tr. pp. 20-22.) The court then revoked his

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1. A Statement of facts is not presented because the issue presented by petitioner do not concern or relay on evidence presented at trial.

"pro per" privilege and appointed the public defender to defend him. (Rep. Tr. p. 23.)

The petitioner's appeal to the California Court of Appeal and in his peti on for hearing before the California Court of Appeal, petitioner merely argued that the trial court improperly revoked his "pro per" status. He argued that since a retained trial counsel cannot be summarily relieved that therefore, pro per status could not be summarily revoked.

It is submitted that since petitioner did not present his present contention before the state appellate courts in the form of a federal question, concerning the Constitution, treaties or laws of the United States, namely, whether he had the absolute right under the Sixth Amendment of the United States Constitution to represent himself, that therefore the contention should not be heard. Cf. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928).[2/]

Assuming the court chooses to hear the issue then it is submitted that a defendant does not have the absolute

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2. When the trial court revoked appellant's "pro per" status, appellant stated:

". . . According to the Sixth Amendment, a defendant has the right to assistance of counsel of his choice, and I believe those are words that are used, when I say "assistance."

"Now if the Court would find it appropriate that defendant act as co-counsel in the matter, I would then move that the Court would make that order."

(Rep. Tr. p. 24.)

California Court of Appeal when discussing this issue noted that "Faretta had no constitutional right to represent himself.

right, under the Sixth Amendment to the Constitution, to defend himself. The California Supreme Court in People v. Sharp, 7 Cal. 3d 448, 103 Cal. Rptr. 233 (cert.denied 410 U.S. 944) held that under the Sixth Amendment, a defendant does not have an absolute right to defend himself and reasoned as follows:

> "In England in precolonial times an accused was as a practical matter, required personally to present his defense if any was to be offered.[3]

> "3 '[I]n matters of fact upon trial, the court are of counsel for you.' (10 Howell's State Trials, Trial of Thomas Rosewell (1684) 147, 151; see also, 1 Pollock & Maitland, History of English Law, p. 211."

> Later he was entitled to representation by counsel in all cases except those involving treason, but counsel's functions were limited. The right to put on a full defense through counsel, whatever the nature of the charge, did not become available until 1836 in England. (Radin, Anglo-American Legal History, p. 230.) The emphasis during this period of the English law was on the right to counsel and, apparently because self-representation was so commonplace, the courts were not called upon to make pronouncements as to whether the right was fundamental.
>
> "In American colonial times self-representation was also commonplace. The early declarations of rights in this area were principally concerned with the right to counsel, and did not deal directly with the right of self-representation. Perhaps the

pronouncement most nearly declaring a right of self-representation is the following appearing in the Pennsylvania Frame of Government (1682): 'That, in all courts all persons of all persuasions may freely appear in their own way, and according to their own manner, and there personally plead their own cause themselves: or, if unable, by their friends. . . .' (See I Schwartz, The Bill of Rights, p. 140.)

> "The Georgia Constitution of 1777, in declaring unauthorized persons who practiced law to be guilty of malpractice, indirectly dealt with the right of self-representation in the following language: 'This is not intended to exclude any person from that inherent privilege of every freeman, the liberty to plead his own cause.' (See I Schwartz, The Bill of Rights, p. 300.) There is language in other colonial declarations of rights which indicate that the concern was not so much the right of self-representation as it was the right not to be compelled to employ and pay counsel in defense of criminal charges. Chapter XXIII of the Concessions and Agreements of West New Jersey (1677) provided: '. . and that no person or persons shall be compelled to fee any attorney or counciller to plead his cause, but that all persons have free liberty to plead his own cause, if he please: And that no person or persons imprisoned upon any account whatsoever within this Province, shall be obligated to pay any fees to the officer or officers of the said prison, either when committed or

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discharged.'[4] (See I Schwartz, The Bill of Rights, p.129.)

"4 The Massachusetts Body of Liberties (1941) similarly provided: 'Every man that findeth himselfe unfit to plead his owne cause in any Court shall have Libertie to imploy any man against whom the Court doth not except, to helpe him. Provided he give him noe fee or reward for his paines. This shall not except the partie him selfe from Answering such Questions in person as the Court shall thinke meete to demand of him.' (See 1 Schwartz, The Bill of Rights, p. 74.)

"We are able to discern from our examination of the early declarations only vague notions of a fundamental right of self-representation which predated the federal Constitution. We now examine the federal Constitution in an effort to determine whether it guarantees such a right.

"The Sixth Amendment of the United States Constitution provides that an accused in a criminal prosecution 'shall enjoy the right . . . to have the Assistance of Counsel for his defence.' In addition to this specific provision, the right to representation by counsel is often held to be compelled on due process grounds and a trial where an accused cannot effectively defend for lack of assistance of competent counsel is fundamentally unfair. [Citations.]

"It is apparent, of course, that constitutional language granting the right to the assistance of

counsel lends no express support to a claim that an accused has the constitutional right to defend without counsel. Nor can due process requirements, in the sense that what justice seeks to achieve is a fair trial, be construed as demanding that an accused be entitled to defend without counsel merely because he is of a mind to do so. This is not to say that the right to counsel, like other constitutional rights, may not be waived in a proper case. Moreover, the Sixth Amendment guarantees only 'assistance,' and does not expressly purport to 'force a lawyer upon a defendant.' [Citations.] Nevertheless, the right to waive a constitutional protection is not itself necessarily a right of constitutional dimensions. [Citations.] In Singer the court had before it the validity of rule 23(a) of the Federal Rules of Criminal Procedure, conditioning the waiver of a jury upon the consent of the government and the court. In response to the argument that the Sixth Amendment's right to a jury trial conferred also a correlative constitutional right to waive a jury, the court stated, 'The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right. . . . [W]e find it difficult to understand how the petitioner can submit the bald proposition that to compel a defendant in a criminal action to undergo a jury trial against his will is contrary to his right to a fair trial or to due process.' (380 U.S. at pp. 34-36 [13 L.Ed.2d at p. 638].)

"Although the court in Singer did not address itself to the right to counsel, no sufficient reason

appears why the waiver of that Sixth Amendment right is a constitutional right when the waiver of the Sixth Amendment's right to a jury trial is not. In either event, a refusal for good cause to give effect to a waiver accords to the accused the very thing the Constitution expressly guarantees him.

"The Supreme Court has never ruled directly upon the issue of a claimed constitutional right to appear pro se. Accuseds' rights in federal courts to 'plead and conduct their own cases personally or by counsel' are expressly conferred only by statute.[5] Consistent with the statutory provisions

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"5 'In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes there.' (28 U.S.C. § 1654; see also The Judiciary Act of 1789.)

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the court has recognized a right to waive counsel, but it has imposed conditions on such right of waiver which appear to give it less stature than the 'Constitutional right' which is being waived.[6]

"6 In dictum in Adams v. United States, supra, 317 U.S. 269, the court stated: 'The right to [the] assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. . . . [T]he Constitution does not force a lawyer upon a defendant.

"He may waive his Constitutional right to [the] assistance of counsel if he knows what he is doing

and his choice is made with eyes open.' (317 U.S. at p. 279 [87 L.Ed. at pp. 274-75]; italics added.)"

"The court has also stated, in a case often relied upon in support of a claimed constitutional right to appear pro se, that 'Neither the historic conception of Due Process nor the vitality it derives from progressive standards of justice denies a person the right to defend himself or to confess guilt. Under appropriate circumstances the Constitution requires that counsel be tendered; it does not require that under all circumstances counsel be forced upon a defendant.' [Citations.] Consistent with the express language of the Constitution itself, Carter recognizes that counsel may not be forced upon a defendant in 'all circumstances'; alternately it must be deemed to recognize that there are circumstances when a defendant must be represented. The holding of Carter is that the record failed to disclose that the accused could not and did not effectively waive counsel. We perceive in neither the language nor the holding support for the proposition that the right to defend pro se is constitutionally compelled. 'All that has really been said by the Supreme Court [in Carter] is that the Sixth Amendment does not prohibit the right of self-representation.' [Citations.]

"The federal Courts of Appeal are divided on the foregoing proposition. The leading case holding that there is a constitutional right to appear pro se is United States v. Plattner (2d Cir. 1964) 330 F.2d 271. The court there relied upon dictum in Adams (supra, fn. 3) to conclude that the Sixth

Amendment 'was surely not intended to limit in any way the absolute and primary right to conduct one's own defense in propria persona.' (330 F.2d at p. 274.) Giving at least passing support to Plattner are Lowe v. United States (7th Cir. 1969) 418 F.2d 100, 103; United States v. Sternman (6th Cir. 1969) 415 F.2d 1165, 1169-70; and Arnold v. United States (9th Cir. 1969) 414 F.2d 1056, 1058. It is to be noted, however, that at least some of those courts which hold that the right to defend pro se is constitutionally compelled do not accord to such right the same force and vitality as the constitutional right to counsel, for they also place conditions on the right to waive (see United States v. Plattner, supra, 330 F.2d 271, 276), and are willing to hold that the denial of the pro se right is not reversible error when no prejudice is shown (see United States v. Abbamonte (2d Cir. 1965) 348 F.2d 700, 704). Moreover, the federal Courts of Appeal of the Eighth, Tenth and District of Columbia Circuits recognize that the pro se right is not constitutionally compelled.[7]

"7 'We find nothing in the Constitution which confers [the right to proceed pro se], or from which a guaranty of such right may be inferred. The truth is that the right [in the federal court] is statutory in character, and does not rise to the dignity of one conferred and guaranteed by the Constitution." [Citations.]

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"In almost 200 years of constitutional interpretation and construction the Supreme Court has not on any occasion held that the right of self-representation in a criminal trial is constitutionally compelled. (See Comment, Self-Representation in Criminal Trials: The Dilemma of the Pro Se Defendant, 59 Cal.L.Rev. 1479, 1487.) Although it is recognized that the Constitution must be read to give it currently relevant meaning in a developing society, there is no express language in any of its provisions which reasonably supports a right of pro se representation. Moreover, as will be seen in the following discussion of California constitutional requirements, social and judicial changes which have taken place during the almost 200 years require greater rather than lesser limitations on the right of self-representation. We conclude that there is no express federal constitutional compulsion to accord an accused the right of self-representation in criminal trials."

It is submitted that this Court should adopt the cogent reasoning of the California Supreme Court and hold that a defendant, under the Sixth Amendment to the United States Constitution, does not have an absolute right to defend himself.

II

PETITIONER WAS NOT DENIED HIS RIGHT TO SUBPOENA WITNESSES

Petitioner contends that he was denied his right to compel the attendance of witnesses, in particular Charles Cunningham, in violation of due process of law. (Petn. pp. 21-24.)

Petitioner did not present this claim at trial and on appeal to the California Court of Appeal did not present the question in the form of a federal question, concerning the Constitution, treaties or laws of the United States. Therefore, it is submitted that this contention should not be heard. Bryant v. Zimmerman, supra, 278 U.S. 63, 67 (1928.)

Moreover, here, petitioner failed to raise the issue in his petition for hearing before the California Supreme Court, thus it is submitted that he can not now raise it. Cf. Beck v. Washington, 369 U.S. 541, 553 (1962)[3/] Bean v. Richardson, 276 U.S. 599 (1927).

Furthermore, the California Court of Appeal rejected the contention because it was not presented at trial and because petitioner's testimony at trial indicated Mr. Cunningham could not be found. Thus, the issue should not be reversed because the decision was based on an adequate non-federal ground. See Staub v. City of Baxley, 355 U.S. 313, 318.

Assuming the court chooses to hear the issue then it is submitted petitioner was not denied the right to compel the attendance of witnesses under the Sixth Amendment to the United States Constitution.

At trial, there was the following testimony by

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3. Rule 29(b) of the California Rules of Court states that:

"On petition for hearing the Supreme Court will not examine the record for error unless the petitioner shows that substantial issues of law or fact were incorrectly stated or were not considered in the opinion of the Court of Appeal and that said issues were raised in the briefs and set forth in a petition for rehearing in the Court of Appeal."

petitioner concerning Charles Cunningham:

"Q You don't know where Charles is?

"A I don't.

"Q Have you made any efforts to find him?

"A Previous to a competency hearing and my subsequent termination, you know, of defendant's representative for defendants, I had subpoened Charles Cunningham to the County for an interview, and I called his mother several times. I had tried to contact him, and I asked Mr. Lieman to endeavor to contact him, and all this has proved fruitless." (Rep. Tr. p. 232.)

Therefore, it appears that Mr. Cunningham was not called because he could not be located, and there is nothing in the record to indicate that he was not called or located because of the actions of the trial court, or because he was not representing himself. (See Petn. pp. 22-23.)[4/] Cf. Washington v. Texas, 388 U.S. 14 (1967).

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4. The only reference to the calling of witnesses by the defense was as follows:

"THE COURT: Have you got any witnesses?

"THE DEFENDANT: Yes, your Honor.

"THE COURT: How are you going to get a hold of them?

"THE DEFENDANT: Well, your Honor, I had hoped the court would grant me access to the law library and I can reach most of them by telephone. I did plan on having a legal runner, who is competent of doing some investigation groundwork." (Rep. Tr. p. 10.)

CONCLUSION

For the foregoing reasons, it is respectfully requested that the petition for certiorari be denied.

Respectfully submitted,

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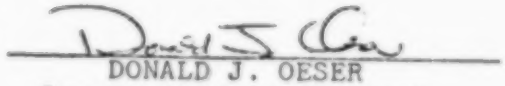
By 
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Supreme Court, U. S.
FILED
AUG 15 1974
MICHAEL RODAK, JR., CLERK

No. 73-5772

ANTHONY PASQUALL FARETTA,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT

BRIEF FOR PETITIONER

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California Civil Procedure
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Section 686.1 11
Section 686.2 12
Section 859 . . . . . 3, 11
Section 987 . . . . . 4, 11
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Other Authorities:

ADVISORY COMMITTEE ON THE PROSECUTION AND DEFENSE FUNCTIONS, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 240 (Tent. Draft March, 1970) 25, 26

ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES (App. Draft 1971) 52

AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE §6.7 (App. Draft 1972). . . . 56, 57

Beaney, *The Right to Counsel in American Courts*, 8-12 (1955) 33, 36

Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to our System of Justice?*, 42 FORD L. REV. 227 (1973) 51, 58

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Note, *Criminal Procedure–Right to Defend Pro Se*, 48 N. CAR. L. REV. 678 (1970) 47

Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175 (1970) 29, 47, 52

Grant, *Our Common Law Constitution*, 5-10 (1960) 33

Comment, *Jury Nullification and the Pro Se Defense: The Impact of Dougherty v. United States*, 21 KAN. L. REV. 48 (1972) 47

Oakes and Lehman, *The Criminal Process of Cook County and the Indigent Defendant*, 1966 UNIV. OF ILL. L. FORUM 584 (1966) 52

Comment, *People v. Sharp: Death Knell For Pro Se Representation in Criminal Trials in California?* 24 HAST. L. J. 431 (1973) 47

PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORTS: THE COURTS 55-56 (1967) 51

1 Schwartz, *The Bill of Rights: A Documentary History*, 71, 74 (1971) 34, 35, 36, 39

Comment, *Self-Representation in Criminal Trials: The Dilemma of the Pro Se Defendant*, 59 CALIF. L. REV. 1479 (1971) 47, 49, 50, 54, 62, 63

THE CHALLENGE OF CRIME IN A FREE SOCIETY, 29, 152 52

Note, *The Right of An Accused to Proceed Without Counsel*, 49 MINN. L. REV. (1965) 47

Comment, *The Right to Appear Pro Se: The Constitution and the Courts*, 64 J. CRIM. L. & CRIM. 240 (1973) 33, 34, 45, 47, 50

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Note, *The Right to Defend Pro Se*, 3 TEX. TECH. L. REV. 89 (1971) 47

Comment, *The Right to Defend Pro Se in Criminal Proceedings*, 1973 WASH. U. L. Q. 679 (1973) 47

Waltz, *Inadequacy of Trial Defense Representation as a Ground For Post-Conviction Relief in Criminal Cases*, 59 NW. U. L. REV. 289 (1964) 52

Note, *Where Is the Constitutional Right to Self-Representation and Why is the California Supreme Court Saying All Those Terrible Things About It?*, 10 CALIF. WESTERN L. REV. 196 (1973) 11, 47, 54

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-5772

ANTHONY PASQUALL FARETTA,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the California Court of Appeal, Second Appellate District, is unreported and appears at A. 25. The order of the California Supreme Court denying a Petition For Hearing is likewise unreported and appears at A. 32.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. §1257(3), the petitioner having asserted below and in this Court a deprivation of rights secured by the Constitution of the United States.

The California Supreme Court denied the Petition For Hearing on August 22, 1973. (A. 32). The Petition For a Writ of Certiorari was timely filed on November 17, 1973, and was granted on March 18, 1974. (A. 65).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

It involves the Due Process Clauses of the Fifth and Fourteenth Amendments.

It further involves Article I, Section 13 of the California Constitution, which provides in material part as follows:

> In criminal prosecutions, in any court whatever, the party accused shall have the right to . . . have the assistance of counsel for his defense . . . and to be personally present with counsel. . . . The Legislature shall have power to require the defendant in a felony case to have the assistance of counsel. . . .

It further involves Section 686 of the California Penal Code which provides in material part as follows:

> In a criminal case the defendant is entitled:
>
> . . . .
>
> 2. To be allowed counsel as in civil actions, or to appear and defend in person and with counsel, except that in a capital case he shall be represented in court by counsel at all stages of the preliminary and trial proceedings.

Also involved is Section 859 of the California Penal Code, which provides in material part as follows:

> When the defendant is charged with the commission of a public offense over which the superior court has original jurisdiction, by a written complaint subscribed under oath and on file in a court within the county in which the public offense is triable, he shall, without unnecessary delay, be taken before a magistrate of the court in which such complaint is on file. The magistrate shall immediately deliver to him a copy of the complaint, inform him that he has the right to have the assistance of counsel, ask him if he desires the assistance of counsel, and allow him reasonable time to send for counsel. However, in a capital case, the court shall inform the defendant that he must be represented in court by counsel at all stages of the preliminary and trial proceedings and that such representation will be at his expense if he is able to employ counsel, or at public expense if he is unable to employ counsel, inquire of him whether he is able to employ counsel and, if so, whether he desires to employ counsel of his choice or to have counsel assigned for him, and allow him a reasonable time to send for his chosen or assigned counsel. . . . upon the request of the defendant, require a peace officer to take a

message to any counsel whom the defendant may name, in the judicial district in which the court is situated. The officer shall, without delay and without a fee, perform that duty. If the defendant desires and is unable to employ counsel, the court shall assign counsel to defend him; in a capital case, if the defendant is able to employ counsel and either refuses to employ counsel or appears without counsel after having had a reasonable time to employ counsel, the court shall assign counsel to defend him. . . .

Also involved is Section 987 of the California Penal Code, which provides as follows:

(a) In a noncapital case, if the defendant appears for arraignment without counsel, he shall be informed by the court that it is his right to have counsel before being arraigned, and shall be asked if he desires the assistance of counsel. If he desires and is unable to employ counsel the court shall assign counsel to defend him.

(b) In a capital case, if the defendant appears for arraignment without counsel, the court shall inform him that he must be represented by counsel at all stages of the preliminary and trial proceedings and that such representation will be at his expense if he is able to employ counsel or at public expense if he is unable to employ counsel, inquire of him whether he is able to employ counsel and, if so, whether he desires to employ counsel of his choice or to have counsel assigned to him, and allow him a reasonable time to send for his chosen or assigned counsel. If the defendant is unable to employ counsel, the court shall assign counsel to defend him. If the defendant is able to employ counsel and either refuses to employ counsel or appears without counsel after having had a reasonable time to employ counsel, the court shall assign counsel to him.

QUESTION PRESENTED

Under California law, defense counsel in criminal trials have the power to make strategic decisions, including decisions to exercise or waive rights guaranteed under the federal constitution; counsel need not consult with their clients with respect to these decisions and may take actions which contravene their clients' desires. In this context, the question presented is whether, consistent with the Fifth, Sixth and Fourteenth Amendments, an indigent defendant can be denied the right to present his own defense and compelled to accept representation by counsel appointed over his objection.[1]

STATEMENT

Petitioner was convicted, following a trial by jury in the Superior Court of Los Angeles County, of grand theft in violation of Section 487(3) of the California Penal Code. Although the public defender was initially appointed to represent petitioner (A. 4), petitioner subsequently moved the trial court for leave to defend *pro se.* Inquiries of the court elicited that petitioner had previously represented himself; that he had a high

[1] The Petition For a Writ of Certiorari raised a second question concerning the refusal of the public defender assigned to represent petitioner to call a witness believed by petitioner to be material to his defense. The record, however, appears to be inadequate to permit a presentation of that question and petitioner, without intending to waive his right to assert his claim in an appropriate post-conviction proceeding, does not pursue it here.

school education; and that although he recognized that the public defender's office was capable of furnishing "equal representation" he believed it was "very loaded down with . . . a heavy case load." (A. 35). The trial court cautioned petitioner that in its view he was "making a mistake" and that in all further proceedings he would "be treated like a lawyer" (A. 38), adding:

> You are going to follow the procedure. You are going to have to ask the questions right. If there is an objection to the form of the question and it is properly taken, it is going to be sustained. We are going to treat you like a gentleman. We are going to respect you. We are going to give you every chance, but you are going to play with the same ground rules that anybody plays. And you don't know those ground rules. You wouldn't know those ground rules any more than any other lawyer will know those ground rules until he gets out and tries a lot of cases. And you haven't done it. (A. 38).

But after carefully establishing on the record that petitioner desired to represent himself and did not want to be represented by counsel, the court made a "preliminary ruling" accepting his waiver of counsel and granting him the right to defend *pro se*. (A. 40). However, the court reserved the right to revoke its ruling if at any time it became apparent that petitioner was unable to represent himself. (A. 40).

Several weeks later, the court, on its own motion, made further inquiry of petitioner with respect to his ability to represent himself. That colloquy was as follows:

THE COURT: In the Faretta matter, I brought you back down here to do some reconsideration as to whether or not you should continue to represent yourself.

How have you been getting along on your research?

THE DEFENDANT: Not bad, your Honor.

Last night I put in the mail a 995 motion and it should be with the Clerk within the next day or two.

THE COURT: Have you been preparing yourself for the intricacies of the trial of the matter?

THE DEFENDANT: Well, your Honor, I was hoping that the case could possibly be disposed of on the 995.

Mrs. Ayers informed me yesterday that it was the Court's policy to hear the pretrial motions at the time of trial. If possible, your Honor, I would like a date set as soon as the Court deems adequate after they receive the motion, sometime before trial.

THE COURT: Let's see how you have been doing on your research.

How many exceptions are there to the hearsay rule?

THE DEFENDANT: Well, the hearsay rule would, I guess, be called the best evidence rule, your Honor. And there are several exceptions in case law, but in actual statutory law, I don't feel there is none.

THE COURT: What are the challenges to the jury for cause?

THE DEFENDANT: Well, there is twelve peremptory challenges.

THE COURT: And how many for cause?

THE DEFENDANT: Well, as many as the Court deems valid.

THE COURT: And what are they? What are the grounds for challenging a juror for cause?

THE DEFENDANT: Well, numerous grounds to challenge a witness – I mean, a juror, your Honor, one being the juror is perhaps suffered, was a victim of the same type of offense, might be prejudice toward the defendant. Any substantial ground that might make the juror prejudice[d] toward the defendant.

THE COURT: Anything else?

THE DEFENDANT: Well, a relative perhaps of the victim.

THE COURT: Have you taken a look at that code section to see what it is?

THE DEFENDANT: Challenge a juror?

THE COURT: Yes.

THE DEFENDANT: Yes, your Honor. I have done –

THE COURT: What is the code section?

THE DEFENDANT: On voir diring a jury, your Honor?

THE COURT: Yes.

THE DEFENDANT: I am not aware of the section right offhand.

THE COURT: What code is it in?

THE DEFENDANT: Well, the research I have done on challenging would be in Witkins Jurisprudence.

THE COURT: Have you looked at any of the codes to see where these various things are taken up?

THE DEFENDANT: No, your Honor, I haven't.

THE COURT: Have you looked in any of the California Codes with reference to trial procedure?

THE DEFENDANT: Yes, your Honor.

THE COURT: What codes?

THE DEFENDANT: I have done extensive

research in the Penal Code, your Honor, and the Civil Code.

THE COURT: If you have done extensive research into it, then tell me about it.

THE DEFENDANT: On empaneling a jury, your Honor?

THE COURT: Yes.

THE DEFENDANT: Well, the District Attorney and the defendant, defense counsel, has both the right to 12 peremptory challenges of a jury. These 12 challenges are undisputable. Any reason that the defense or prosecution should feel that a juror would be inadequate to try the case or to rule on a case, they may then discharge that juror.

But if there is a valid challenge due to grounds of prejudice or some other grounds, that these aren't considered in the 12 peremptory challenges. There are numerous and the defendant, the defense and the prosecution both have the right to make any inquiry to the jury as to their feelings toward the case.

THE COURT: The Court having observed the conduct and the demeanor of the defendant, in addition to what he said, does not believe that the defendant has made an intelligent and knowing waiver of his constitutional right to be represented by an attorney. Also taking into consideration the recent case of People versus Sharp, where the defendant apparently does not have a constitutional right to represent himself, the Court finds that the ends of justice and requirements of due process require that the prior order permitting the defendant to represent himself in pro per should be and is hereby revoked. That privilege is terminated.

The Public Defender is appointed to represent the defendant in this case. (A. 46-48).

Petitioner promptly urged that he was entitled under the Sixth Amendment to the assistance of counsel of his own choice. He moved for leave to act as co-counsel, and this motion was likewise denied. (A. 49). Petitioner on three occasions moved for the appointment of a lawyer other than the public defender, and these motions were denied. (A. 49, 54, 58-59).

Following the termination of the order entitling petitioner to defend *pro se* and the appointment of the public defender, on several occasions petitioner was denied an opportunity to make requests and motions on his own behalf, the trial court requiring petitioner to act solely through his counsel. *E.g.*, A. 49, 63, 64).

At the conclusion of the trial, the jury found petitioner guilty of grand theft in violation of Section 487(3) of the California Penal Code. (A. 13). Petitioner was sentenced to state prison for the term prescribed by law.

On appeal, the California Court of Appeal stated that petitioner had no constitutional right to represent himself, citing a recent decision of the Supreme Court of California. *People v. Sharp*, 7 Cal.3d 448, 103 Cal.Rptr. 233, 499 P.2d 489 (1972), *cert. den.*, 410 U.S. 944 (1973). It held that the trial court could not be said to have "abused its discretion in concluding that Faretta had not made a knowing and intelligent waiver of his right to be represented by counsel" and that petitioner "did not appear aware of the possible

consequence of waiving the opportunity for skilled and experienced representation at trial." (A. 27).[2]

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[2] Although from the face of the applicable California Statutes (Calif. Pen. Code §§686, 859, and 987) it might appear that the Court of Appeal was in error in concluding that under California law an accused has no right to defend *pro se*, at least in a non-capital case, its decision was indeed in accordance with the controlling decision of the Supreme Court of California. In *People v. Sharp*, 7 Cal.3d 448, 103 Cal. Rptr. 233, 499 P.2d 489 (1972), *cert. den.*, 410 U.S. 944 (1973), the Supreme Court declared that as a matter of both California and Federal Constitutional law a defendant has no right to defend *pro se*. *Sharp* represented a departure from previous interpretations of California law. See Note, *Where is the Constitutional Right to Self Representation and Why is the California Supreme Court Saying All Those Terrible Things About It?*, 10 CALIF. WESTERN L. REV. 196, 198 n. 14 (1973). The California Constitution, as it then read at the time *Sharp* was tried, provided that a defendant in a criminal case had the right "to appear and defend, in person and with counsel." Article I, Section 13. The California Supreme Court had construed that language as meaning "in person *or* with counsel"; the accused could be made to choose between self-representation and representation by an attorney. *People v. Mattson*, 51 Cal.2d 777, 336 P.2d 937 (1959). In *Sharp*, however, the California Supreme Court concluded that, earlier judicial expressions to the contrary, Article I, Section 13 did not create a right to defend *pro se*.

By the time *Sharp* was decided, the California Constitution had been amended, and new legislation enacted; although these revised provisions were not applicable in *Sharp*, the Court in an appendix commented upon them. See 7 Cal.3d, at 463-64. The right of the defendant to "appear and defend in person" was deleted from Article I, Section 13, and the Legislature was expressly empowered "to require the defendant in a felony case to have the assistance of counsel." The new statutes, however, on their face purport to exercise that power only in capital cases. See CALIF. PEN. CODE §§686(2), 686.1, 859, & 987. In

SUMMARY OF ARGUMENT

I.

The question of whether a defendant in a criminal case is entitled to defend *pro se* must be examined in the specific context of California criminal procedure:

(a) An indigent defendant is not entitled to select his own counsel. In counties with a public defender's office, the accused ordinarily must accept the assignment of any attorney from that office. When private counsel is appointed, the court's discretion in making the selection is virtually total; the defendant has no right to compel the appointment of any particular lawyer, even where the lawyer of his choice is willing to serve at the established rate of compensation. As a consequence, an indigent defendant has no right to select his counsel and may be represented by an attorney he does not want and in whom he does not repose confidence.

(b) Once a defendant is represented by counsel, the lawyer becomes the manager of the lawsuit. Except as to a very few particularly fundamental decisions (*i.e.*, to plead guilty, waive jury trial, and whether or not to testify), counsel's decisions as to fundamental matters of trial strategy and the exercise of the defendant's constitutional rights are final.

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non-capital cases, the defendant by statute continues to have the right "to appear and defend in person and with counsel." *Id.*, §686(2). However, the California Supreme Court, in an appendix to *Sharp*, expressly stated that this language, identical to the former Article I, Section 13 construed in *Sharp*, does not provide a right of self-representation. 7 Cal.3d, at 464.

(c) A defendant will not be relieved from the consequences of his counsel's actions, and cannot attack his representation as inadequate, unless the representation afforded him was so demonstrably insufficient as to reduce the trial to a "farce or a sham." There is thus a measurable gap between grossly incompetent representation for which there is an appellate or collateral remedy and representation which, objectively measured, was genuinely competent.

This case does not call these aspects of California criminal procedure into question. A defendant who chooses to be represented by counsel can reasonably be regarded as acceding to this settled allocation of power between client and counsel. But for the present case the consequences of these aspects of California practice are significant. For in California, an indigent defendant may well be assigned an attorney in whom he has no confidence and who may insist upon taking actions with which he does not agree. In those circumstances, the defendant has no recourse – unless he is permitted to defend *pro se*.

II.

The right to present one's own defense has been assumed to be of constitutional dimension in several decisions of this Court, most notably *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942). The right is not merely a privilege to reject that which the Sixth Amendment right-to-counsel clause assures. Rather, at least in the context of a system which denies the

indigent defendant the right to select the counsel of his choice and requires him to accept the tactical decisions of his attorney, the right to defend *pro se* is the only available means by which the accused can ensure that the defense which is presented is the defense of *his* choice. It is a right of fundamental importance, reflected in the very structure of the Sixth Amendment, and equally an essential component of due process of law.

The right of an accused to present his own defense was virtually unquestioned at the time of the Constitution's adoption. Both in England and in colonial America, the common practice was for persons accused of crimes to represent themselves. Moreover, early documents evidence a widespread hostility to lawyers and, reflecting that antipathy, guarantee the right of an accused personally to plead his cause. Thus the right to defend *pro se* was widely appreciated at the time the Constitution was adopted.

In light of contemporary constitutional principles, the right to defend *pro se* is at the core of due process. At bottom, the generalized concept of due process – illuminated by the confrontation and compulsory process clauses of the Sixth Amendment – means that a defendant in a criminal case cannot be deprived of the opportunity to shape and present his defense according to his own lights. If he elects to be represented by counsel, he of course may be deemed to have acceded to the customary allocation of power which leaves to counsel the authority to make fundamental tactical and procedural choices. But he cannot be compelled to do so where the consequence,

under local law, is to deprive him of the power to see his defense presented as he wants it to be.

The entire focus of the Sixth Amendment is upon the rights of "the accused." It is *his* right – not counsel's – "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." Thus the Court has found within the concept of due process and the Sixth Amendment a right of the accused to be present at all critical stages. That right confers more than the opportunity to be an interested spectator. Its constitutional standing was explained by Justice Cardozo as resting upon the defendant's right "to give advice . . . or even to supersede his lawyers altogether and conduct the trial himself." *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934).

In most cases, the defendant will wish to be represented by counsel and will accept the consequences of that representation. But where that relationship is not one of trust and confidence, the imposed assistance of counsel does not ensure that the accused's trial will comport with due process. In that circumstance, especially when the defendant does not concur in the lawyer's proposed course of defense, then the right of self-representation provides the only available alternative to a circumstance which is intolerable from the point of view of defendant, counsel and court. Even though the accused's grounds for disagreement with and perceptions about his lawyer may, objectively viewed, seem unfair, he is unlikely to be disabused of them; and if convicted he will surely harbor deep resentments concerning the process which resulted in punishment. Respect for individual dignity is served by permitting the accused, even where his defense might have better been presented by an attorney, "to go to jail under his own banner if he so

desires and if he makes the choice 'with eyes open.'" *United States ex rel. Maldonado v. Denno*, 348 F.2d 12, 15 (2d Cir. 1965), *cert. den.*, 384 U.S. 1007 (1966).

III.

The right of self-representation imposes no burdens upon the administration of justice which would warrant its infringement. The defendant who represents himself is not entitled to be treated differently than defendants represented by counsel. While trial judges are frequently solicitous in such cases, nothing in the Constitution requires them to assist *pro se* defendants. Moreover, it is open to the trial judge to appoint "standby counsel" to provide such assistance as the *pro se* defendant needs and wants. That procedure is available in California and should be encouraged.

Instances of courtroom disruption by defendants representing themselves have been exceedingly rare. But for those who do not conform their conduct to the requirements of the trial court, there are swift and effective remedies, including contempt, termination of the right of self-representation, and in extreme cases removal from the courtroom. *Illinois v. Allen*, 397 U.S. 337 (1970).

IV.

The accused who seeks to defend *pro se* should be permitted to do so unless his relinquishment of the

right to counsel cannot be said to be knowing and intelligent. The controlling test is the familiar standard of waiver; as the Court phrased it, the issue is whether the accused "knows what he is doing and [whether] his choice is made with eyes open." *Adams v. United States ex rel. McCann*, *supra*, at 279. Once it is determined that the waiver is knowing and intelligent, the defendant must be allowed to present his own defense. The trial court may not deny the right simply because the defendant does not seem to possess substantial knowledge of the law, for constitutional rights are not dependant upon possession of a high degree of skill in their exercise.

V.

This Court recognized in *Chapman v. California*, 386 U.S. 18, 23 (1967) that some rights are so basic that their denial can never be regarded as harmless. The right to defend *pro se* is such a right. At stake is a question of fundamental fairness raised by a process which denies the defendant, whose liberty is at stake, the right to control the presentation of his defense. Moreover, to inject the issue of whether the error was "harmless" in the sense that it contributed to the outcome would denigrate the right "since rarely if ever can there be a showing of prejudice in terms of result from the conduct of a trial by counsel." *United States v. Dougherty*, 473 F.2d 1113, 1148 (D.C. Cir. 1972).

ARGUMENT

I.

INTRODUCTION: THE CONSEQUENCES OF REPRESENTATION BY COUNSEL IN CALIFORNIA.

A. Counsel Has Authority to Make Binding Decisions.

A defendant who retains counsel, or who accepts the appointment of an attorney, is bound under California law to accept the consequences of representation. The power of his attorney to make important strategic decisions, including those which involve the decision to exercise or to waive rights guaranteed under the federal constitution, is established. A lawyer representing a criminal defendant is "the manager of the lawsuit." *Rhay v. Browder*, 342 F.2d 345, 349 (9th Cir. 1965). On a wide variety of matters, his decision binds the client, whether made without consultation or even, after consultation, in express disregard of the client's desires. The following are examples of the California decisions in this regard:

(1) Counsel may decide not to cross-examine an adverse witness (a right guaranteed under the Sixth and Fourteenth Amendments, *see, e.g., Chambers v. Mississippi*, 410 U.S. 284 (1973)). *E.g., People v. Foster*, 67 Cal.2d 604, 606-07, 63 Cal.Rptr. 288, 432 P.2d 976 (1967); *People v. Monk*, 56 Cal.2d 288, 299 14 Cal.Rptr. 633, 363 P.2d 865 (1961). See also *Brookhart v. Janis*, 384 U.S. 1, 8 (1966) (Harlan, J. concurring).

(2) Counsel may decide not to call witnesses desired by the defendant to be subpoened. *E.g., People v. Williams*, 2 Cal.3d 894, 905, 88 Cal.Rptr. 208, 471 P.2d 1008 (1970), *cert. den.*, 401 U.S. 919 (1971); *People v. Monk, supra; People v. Seals*, 191 Cal.App.2d 734, 739, 13 Cal.Rptr. 7 (1961).

(3) Despite the express demand of the defendant that a plea of not guilty by reason of insanity be withdrawn, counsel may insist that the plea stand. *People v. Merkouris*, 46 Cal.2d 540, 554-55, 297 P.2d 999 (1956).

(4) Counsel may decline to object to the introduction of evidence on Fourth Amendment grounds and thereby waive the defendant's constitutional claim. *E.g., People v. Pineda*, 253 Cal.App.2d 443, 470, 62 Cal.Rptr. 144 (1967); *cf. People v. Garrison*, 246 Cal.App.2d 343, 350-51, 54 Cal.Rptr. 731 (1966) (tactical decision of counsel to refrain from objecting to introduction of tape recordings of conversations between defendant and his wife binding upon client). Such a waiver by counsel is likewise binding upon the client for federal habeas corpus purposes. See *Henry v. Mississippi*, 379 U.S. 443 (1965).

(5) Counsel may agree to a continuance, without consultation with the defendant, thus waiving his right to speedy trial under *Smith v. Hooey*, 393 U.S. 374 (1969). *E.g., McCullar v. Superior Court*, 264 Cal.App.2d 1, 5, 70 Cal.Rptr. 21 (1968). The power of counsel to bind the defendant in this respect is implicit in *Barker v. Wingo*, 407 U.S. 514, 534-36 (1972).

(6) Counsel may withdraw a motion for mistrial without the consent of his client. *People v. Watson*, 244 Cal.App.2d 89, 95, 52 Cal.Rptr. 821 (1966).

(7) Counsel may prevent – by refusing to join in the motion – a defendant from making a peremptory challenge to the trial judge.[3] *People v. Jackson*, 186 Cal.App.2d 307, 8 Cal.Rptr. 849 (1960).

(8) A defendant represented by counsel may not argue his cause to the jury over the objections of his counsel. *People v. Hill*, 70 Cal.2d 678, 691-92, 76 Cal.Rptr. 225, 452 P.2d 329 (1969) (penalty trial in capital case).

(9) Counsel may, despite the objections of the client, refrain from moving under Section 995 of the Penal Code to set the information aside on grounds of legal insufficiency. *People v. Nailor*, 240 Cal.App.2d 489, 494, 49 Cal.Rptr. 616 (1966). This principle presumably would apply to an election not to challenge a grand jury on grounds of racial exclusion. See *Winters v. Cook*, 489 F.2d 174 (5th Cir. 1973) (en banc).

In general, then, counsel may waive fundamental – indeed, constitutionally protected – rights of the

[3]Under California procedure, any party to a criminal or civil case may make a peremptory challenge to the judge. If such a motion is timely made, the judge must be disqualified. CALIF. CODE CIV. PRO. §170.6. Understandably, such motions are not inevitably appreciated by trial judges, and many California trial attorneys are reluctant to exercise the right to make such a challenge.

defendant.[4] He need not apprise the defendant of those rights or discuss them with him. Moreover, in the event of disagreement counsel's judgment is controlling.

B. An Indigent Has No Right to Select Counsel Of His Choice.

The grant of power to counsel just described is made vastly more significant by two other features of California law. First, the right of an indigent defendant to counsel does not entitle him to select the counsel of his choice. In many counties, including Los Angeles, there is a public defender. In that circumstance, the trial court is required to appoint the public defender unless "the court finds that because of a conflict of interest or other reasons the public defender has properly refused to represent the person accused." CALIF. PEN. CODE §987.2; see *People v. Hughes*, 57 Cal.2d 89, 98, 17 Cal.Rptr. 617, 367 P.2d 33 (1961) (interpreting predecessor statute, CALIF. PEN. CODE §987a). See also *Drumgo v. Superior Court*, 8 Cal.3d

[4]There are a few instances in which the client's desires as respects the exercise of rights deemed particularly fundamental are controlling. Article I, Section 7 of the California Constitution requires an express waiver by the defendant of the right to jury trial. See *People v. Hill*, 67 Cal.2d 105, 114, 60 Cal. Rptr. 239, 429 P.2d 586 (1967); see also *Patton v. United States*, 281 U.S. 276, 312 (1930). A guilty plea, of course, requires the defendant's personal acquiesence as a matter of federal constitutional law. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Brookhart v. Janis*, 384 U.S. 1 (1966). And counsel cannot prevent his client from testifying. *People v. Robles*, 2 Cal.3d 205, 214-15, 85 Cal. Rptr. 166, 466 P.2d 170 (1970).

930, 106 Cal.Rptr. 631, 506 P.2d 1007, *cert. den.*, ___ U.S. ___, 38 L.Ed.2d 223 (1973); *People v. Miller*, 7 Cal.3d 562, 574, 102 Cal.Rptr. 841, 498 P.2d 1089 (1972); *People v. Massie*, 66 Cal.2d 899, 910, 59 Cal.Rptr. 733, 428 P.2d 869 (1967); *People v. Taylor*, 259 Cal.App.2d 448, 450-51, 66 Cal.Rptr. 514 (1968). Indeed, the defendant does not even have the right to object to the assignment of a particular deputy public defender or to demand a deputy he specifically desires. *Drumgo v. Superior Court, supra*, at 934; *People v. Stroble*, 36 Cal.2d 615, 629, 226 P.2d 330 (1951), *aff'd.*, 343 U.S. 181 (1952). And where a disagreement arises in mid-trial over questions of trial strategy, the indigent defendant cannot compel the appointment of another lawyer. *See, e.g., In re Luna*, 257 Cal.App.2d 754, 757, 65 Cal.Rptr. 121 (1968) and cases cited.

Even where private counsel must be appointed, the defendant's desires need not be respected. *Drumgo v. Superior Court, supra.*[5] The *Drumgo* case illustrates the California practice. There the public defender had a conflict of interest and was unable to represent Drumgo, a defendant in a serious murder case. Drumgo sought the appointment of attorney Hodge, a concededly able lawyer who was ready, willing and able to represent him. The trial court, however, appointed another attorney over the objections of Drumgo, attorney Hodge, and the appointed lawyer. This action was upheld by the California Supreme Court, which found such matters to be within the discretion of the

[5]If the defendant becomes dissatisfied with his appointed counsel the trial court is not required to, and frequently will not, appoint another lawyer, even where a serious disagreement exists. See *People v. Williams*, 2 Cal. 3d 894, 88 Cal. Rptr. 208, 471 P.2d 1008 (1970), *cert. den.*, 401 U.S. 919 (1971).

trial judge; the court ruled that, as a matter of law, "there can be no abuse of that discretion when the court appoints competent counsel who is uncommitted to any position or interest which would conflict with providing an effective defense." *Id.*, at 935.

C. The Test of Inadequate Representation Is Stringent.

The other feature of California law and practice which bears upon the issues of this case is the high burden which must be met when a defendant challenges the representation afforded him as legally inadequate. The leading case is *People v. Ibarra*, 60 Cal.2d 460, 34 Cal.Rptr. 863, 386 P.2d 487 (1963), holding that "[t]o justify relief . . . 'an extreme case must be disclosed.' [citations]". *Id.*, at 464. It must appear that counsel's lack of diligence or competence reduced the trial to a "'farce or a sham'." *Id.*, at 464. The showing of incompetence must be substantial. "It is not sufficient to allege merely that the attorney's tactics were poor, or that the case might have been handled more effectively." *People v. Floyd*, 1 Cal.3d 694, 709, 83 Cal.Rptr. 608, 464 P.2d 64 (1970). "Defendant has the burden . . . of establishing his allegation of inadequate representation 'not as a matter of speculation but as a demonstrable reality.'" *People v. Reeves*, 64 Cal.2d 766, 774, 51 Cal.Rptr. 691, 415 P.2d 35 (1966). "It is not enough that defendant alleges omissions of counsel indicating lack of preparation and general incompetence. He must show that such acts or omissions resulted in a withdrawal of a crucial defense from the

case." *People v. Hill,* 70 Cal.2d 678, 689, 76 Cal.Rptr. 225, 452 P.2d 329 (1969). "[E]ven 'debatable trial tactics' do not 'constitute a deprivation of the effective assistance of counsel.'" *People v. Miller,* 7 Cal.3d 562, 573, 102 Cal.Rptr. 841, 498 P.2d 1089 (1972). These and numerous other reported decisions rejecting inadequacy of counsel claims[6] attest to the reluctance of California appellate courts to set aside a conviction on this ground.[7]

D. In Light of These Aspects of California Law, A Right of Self-Representation Is Essential.

It bears emphasis that we do not criticize the California practice in any of these respects, let alone suggest that any of the California rules are constitutionally infirm. It may be presumed that a defendant, *represented by counsel chosen by or at least acceptable*

[6] *E.g., People v. Stephenson,* 10 Cal. 3d 652, 111 Cal. Rptr. 556, 517 P.2d 820 (1974); *People v. Reagle,* 6 Cal.3d 441, 99 Cal.Rptr. 313 (1972); *In re Downs,* 3 Cal.3d 694, 91 Cal. Rptr. 612, 478 P.2d 44 (1970); *In re Branch,* 70 Cal.2d 200, 74 Cal.Rptr. 238, 449 P.2d 174 (1969); *In re Beaty,* 64 Cal.2d 760, 764, 51 Cal.Rptr. 521, 414 P.2d 817 (1966); *In re Rose,* 62 Cal. 2d 384, 42 Cal.Rptr. 236, 398 P.2d 428 (1965).

[7] This stringent standard is more restrictive than that evolving in some other jurisdictions. *Compare United States v. DeCoster,* 487 F.2d 1197, 1202 (D.C. Cir. 1973) ("[A] defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate"); *Coles v. Peyton,* 389 F.2d 224 (4th Cir.), *cert. den.,* 393 U.S. 849 (1968); *Beasley v. United States,* 491 F.2d 687 (6th Cir. 1974).

to him, should be bound by tactical decisions of counsel even where those decisions affect constitutional rights. This allocation of power to counsel is generally accepted as grounded on sound and fundamental considerations of policy. It is supported by the American Bar Association Project on Standards for Criminal Justice, whose advisory committee stated:

> Numerous strategic and tactical decisions must be made in the course of a criminal trial, many of which will be made in circumstances which will not allow extended, if any, consultation. Every experienced advocate can recall the disconcerting experience of trying to conduct the examination of a witness or follow opposing arguments or the judge's charge while the client "plucks at his sleeve" offering gratuitous suggestions. Some suggestions, especially as to which witnesses to call and in what sequence and what should be said in argument to the jury, can be anticipated sufficiently so that counsel can ordinarily consult with his client concerning them. Because these decisions require the skill, training and experience of the advocate, the power of decision on them must rest with the lawyer, but that does not mean that he should completely ignore his client in making them. The lawyer should seek to maintain a cooperative relationship at all stages, while maintaining also the ultimate choice and responsibility for the strategic and tactical decisions in the case.[8]

[8] ADVISORY COMMITTEE ON THE PROSECUTION AND DEFENSE FUNCTIONS, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 240 (Tent. Draft, March, 1970). Except for decisions as to the plea, waiver of jury trial, and whether the accused should testify (*id.,* §5.2(a)), the report concludes that "decisions on what

As the Court of Appeals for the Ninth Circuit put it:

> One of the surest ways for counsel to lose a lawsuit is to permit his client to run the trial. We think few competent counsel would accept retainers, or appointment under the Criminal Justice Act of 1964, to defend criminal cases, if they were to have to consult the defendant, and follow his views, on every issue of trial strategy that might, often as a matter of hindsight, involve some claim of constitutional right.[9]

It may likewise be presumed that ordinarily an indigent defendant who requests the assistance of counsel may not demand a particular lawyer, and that absent extreme circumstances a court need not relieve a defendant from the consequences of his counsel's actions, even if less than fully competent. These aspects

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witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client." *Id.*, §5.2(b).

[9] *Nelson v. California*, 346 F.2d 73, 81 (9th Cir. 1965). The Court of Appeals held that *Fay v. Noia*, 372 U.S. 391 (1963) notwithstanding, counsel's waiver of constitutional rights in numerous matters precludes their subsequent assertion in a federal habeas corpus proceeding. See also *Henry v. Mississippi*, 379 U.S. 443 (1965); *Wilson v. Gray*, 345 F.2d 282 (9th Cir. 1965), *cert. den.*, 382 U.S. 919 (1965). Significantly for present purposes, the Court of Appeals in *Nelson* assumed that a defendant such as Nelson was "not without remedy. He can discharge his counsel and the court can in its discretion, if counsel is appointed, appoint new counsel." *Id.*, at 81 n.9. As we have seen (see pp. 21-23, *supra*), this assumption would not, if applied to present day California practice, be accurate.

of California practice we take to be given, and do not question them here. But they have particular significance in light of the relatively recent California decision (*People v. Sharp*, 7 Cal.3d 448, 103 Cal.Rptr. 233, 499 P.2d 489 (1972), *cert. den.*, 410 U.S. 944 (1973)) stripping a defendant, such as petitioner, of the right to reject the appointment of an attorney he can neither select or direct. The interplay of the principles described above and the rule in *Sharp* was recently described by Mr. Justice Mosk as follows:

> The attorney-client relationship contemplates trust and mutual cooperation, particularly where the attorney is defending the client's liberty. [citation] The desirability of a relationship of trust and confidence between an indigent defendant and his attorney has been elevated to indispensibility as a result of *People v. Sharp* [citations], holding that a defendant has no constitutional right to defend *pro se* at trial. Prior thereto an indigent defendant had three choices open to him if he lacked confidence in his appointed counsel and the judge refused to designate an attorney of his choice: he could permit the attorney to represent him and abjectly be bound by crucial trial decisions with which he might disagree [citations]; he could dismiss the attorney and proceed to represent himself [citations]; or he could in unusual circumstances dismiss the attorney from responsibility for the case and represent himself but have counsel standing by for advice [citations]. After *Sharp* an indigent has no choice as a matter of right; he must be represented by the appointed counsel. Thus in this case [in which the defendant's motion for the appointment of an attorney acceptable to him had been denied], the defendant must

> proceed with the appointed attorney, in place of other counsel in whom he has expressed confidence; as a result he will be compelled to acquiese in subsequent trial tactics which he may find objectionable.[10]

For the reasons which follow, the principle introduced in *Sharp* – when embossed upon a system which denies an indigent the power to choose his champion and denies a defendant represented by counsel the power to control the presentation of his defense, including the exercise of fundamental procedural rights – cannot be squared with the imperative of due process.

II.

A DEFENDANT CANNOT BE COMPELLED TO ACCEPT REPRESENTATION BY COUNSEL WHEN A CONSEQUENCE OF SUCH REPRESENTATION IS TO DENY THE DEFENDANT THE POWER TO DETERMINE WHETHER TO WAIVE FUNDAMENTAL RIGHTS AND TO CONTROL THE PRESENTATION OF HIS DEFENSE.

We have described at some length the consequences of a defendant's acceptance of representation by counsel in California[11] because given that relationship

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[10] *Drumgo v. Superior Court*, 8 Cal.3d 930, 938-39 106 Cal.Rptr. 631, 506 P.2d 1007 (1973) (dissenting opinion), *cert. den.*, ___ U.S. ___, 38 L. Ed. 2d 223 (1973).

[11] While doubtless there are variations nationally as to the extent of counsel's power to control the conduct of the defense and to waive various of the defendant's rights, California law is by no means ideosyncratic. See generally Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175, 1213-20 (1970); *Henry v. Mississippi*, 379 U.S. 443 (1965); see also the American Bar Association Report cited in note 8, *supra*.

the right of an accused to present his own defense takes on special significance.

When the California Supreme Court held, in *People v. Sharp*, 7 Cal.3d 448, 103 Cal.Rptr. 233, 499 P.2d 489 (1972), *cert. den.*, 410 U.S. 944 (1973) that the Constitution does not guarantee the right of self-representation, it did not discuss the issue in the context of the contemporary allocation of responsibility and power between defendant and counsel. Its opinion did not frame the issue as involving the more fundamental question of whether the State may, against the objections of the defendant, deprive him of the right to participate in the shaping and conduct of his defense and personally to decide whether or not to exercise various procedural rights secured to him by the Constitution and by other fundamental laws.[12] Rather, that court, after a cursory determination that the right of self-representation was not historically fundamental,

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[12] It bears emphasis that in so framing the issue which this case presents, we do *not* now contend that a defendant who voluntarily retains or accepts the appointment of counsel must be afforded the final power of management of the defense. Those who knowingly choose to be represented by counsel may be held to the consequence of that election. The question here is whether, given the now apparently settled allocation of power between counsel and client, the State may compel an unwilling defendant to accept counsel.

viewed the question as whether the Sixth Amendment impliedly contained the right to waive the assistance of counsel. It concluded that *Singer v. United States*, 380 U.S. 24 (1965) foreclosed any claim that the Sixth Amendment automatically carried with it the right to reject the appointment of counsel.

Even on its own terms, the analogy to *Singer* is imperfect. *Singer* dealt with the right of trial by jury and concluded that the defendant could not compel the Government to submit to a court trial. As the Court recognized (see 380 U.S., at 25 n.2, 35-36), trial by jury is the "normal and . . . preferable mode of disposing of issues of fact in criminal cases" (*Patton v. United States*, 280 U.S. 276, 312 (1930)), and indeed Article III, Section 2 of the Constitution provides that the trial of all criminal cases "*shall* be by jury." (Emphasis added). Moreover, as the Court noted, "the Government, *as a litigant*, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result." (380 U.S. at 36, emphasis added). In contrast, "the Government, *as a litigant*" has no legitimate interest whatever in compelling the accused to accept representation by counsel nor, *a fortiori*, to have the defense conducted in a particular fashion which may differ from that which the accused desires.[13]

[13]This crucial distinction, overlooked entirely by the California Supreme Court in *Sharp*, applies equally to all of the other examples given in *Singer* of instances in which the accused may not insist upon waiving rights over the objections of the prosecution: the defendant may not (1) waive his right to a public trial and compel a private one; (2) waive his right to be tried in the district where the crime was committed and compel transfer of the trial to another place; (3) waive his right to be confronted by the witnesses against him and compel the prosecutor to try the case on a stipulation. (380 U.S., at 35). Here, however, the only interests which might conceivably be asserted to justify a denial of the right of self-representation, such as the desire to assure that the defendant in fact receives an adequate defense, are of no concern to the Government in its capacity "as a litigant." Moreover, the prosecutor in this case expressed no objection to the accused's being permitted to represent himself.

Significantly, when this Court in *Singer* listed various other rights which the accused could not waive over the objections of the prosecution (see note 13, *supra*), it refrained from including the right to counsel as among them.[14] That omission has added significance in light of the Court's earlier expressions on the right of self-representation, most notably *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279-80 (1942):

> The right to assistance of counsel *and the correlative right to dispense with a lawyer's help* are not legal formalisms. They rest on considerations that go to the substance of the accused's position before the law. . . . [T]he Constitution does not force a lawyer upon a defendant. He may waive his constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open. [citation].

[14]See 380 U.S., at 35. The Court, after listing certain rights which the defendant could not waive without prosecutorial consent, described the waiver of counsel as a matter which "can be subjected to reasonable procedural regulations." *Id.*

> . . . . What were contrived as protections for the accused should not be turned into fetters. . . .
>
> . . . . When the administration of the criminal law in the federal courts is hedged about as it is by the Constitutional safeguards for the protection of an accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution. (Emphasis added).[15]

In any event, the right of self-representation in a system where counsel is the ultimate manager of the litigation is not bottomed solely upon an implied right to reject that which the right-to-counsel clause of the Sixth Amendment assures. It lies at the very core of due process as assured by the Fifth and Fourteenth Amendments. Due Process, both as understood through historical usage (see Section A, *infra*, at pp. 33-40), in the elaborations of this Court and by the weight of authority in the lower courts (see Section B, *infra*, at pp. 40-53), at a minimum forbids the State to deprive the defendant, by the compelled imposition of counsel, of the right to present his defense according to his own lights and to decide whether or not to exercise or waive those fundamental rights which the law affords him. Likewise, the right of a defendant to present his own defense is implicit in the provisions of the Sixth Amendment which secure "the accused" the right "to be confronted with the witnesses against him" and to "compulsory process for obtaining witnesses in his favor. . . ."

[15] *See also Carter v. Illinois*, 329 U.S. 173, 174-75 (1946); *Price v. Johnston*, 334 U.S. 266, 285 (1948); *Moore v. Michigan*, 355 U.S. 155, 161 (1957).

A. The Historical Role and Right of Self-Representation.

In England prior to 1836, counsel were permitted to assist criminal defendants as of right only in misdemeanor and treason cases. J. GRANT, OUR COMMON LAW CONSTITUTION 5-10 (1960) (hereafter "GRANT"); W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 8-12 (1955) (hereafter "BEANEY"). The resulting practice was that persons accused of felonies were compelled to represent themselves.[16]

In colonial America, a theoretical right to the assistance of counsel was included in some early charters. Other colonies followed the English practice without substantial change. And, because of the scarcity of attorneys, the common practice was for persons accused of crime to represent themselves. GRANT, *supra* at 9-10; BEANEY, *supra* at 14-22. See also *People v. Sharp*, *supra*, 7 Cal.3d at 453-54; Comment: *The Right to Appear Pro Se: The Constitution and the Courts*, 64 J. CRIM. L. & CRIM. 240, 244 (1973) (hereafter *"The Right to Appear Pro Se"*). Although the right was rarely articulated (*The Right to Appear Pro Se*, *supra* at 244) the available historical evidence establishes that self-representation was more than a practice of the era; it was considered fundamental.

The need for a right of self-representation grew, in part, from the colonists' unfavorable association of lawyers with the British Crown. *The Right to Appear Pro*

[16] Some English judges permitted counsel to argue points of law raised by defendants. But the practice varied from case to case, and cannot be considered a right to counsel. See GRANT, *supra* at 5-6.

Se, supra at 245 n.67. The earliest colonial expression of the disdain for lawyers which made self-representation an essential right appears in *The Massachusetts Body of Liberties*, (1641): *A coppie of the liberties of the Massachusets Colonie in New England.* Article 26 provides:

> Every man that findeth himself unfit to please his owne cause in any Court shall have Libertie to imploy any man against whom the Court doth not except, to helpe him, Provided he give him noe fee or reward for his paines. This shall not exempt the partie him selfe from Answering such Questions in person as the Court shall thinke meete to demand of him.[17]

The colonial antipathy for lawyers which deprived them of the ability to collect fees for court appearances was reflected in virtually all of the colonies. *The Right to Appear Pro Se, supra* at 245. In West New Jersey, for example, Chapter XXII of the *Concessions and Agreements* (1677) provided that "no person or persons shall be compelled to fee any attorney or counciller to plead his cause, but that all persons have free liberty to plead his own cause, if he please . . . ."[18]

Similarly, in Pennsylvania, whose *Frame of Government* (1682) has been called "the most influential of the Colonial documents protecting individual rights,"

[17]Reproduced in 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 71, 74 (1971) (hereafter "SCHWARTZ").

[18]SCHWARTZ, at 126,129. The subtitle of this document is "The Charter of Fundamental Laws, of West New Jersey, Agreed Upon." *Id.*, at 126.

Schwartz, supra at 130, it was expressly provided in Article VI of *The Laws Agreed Upon in England, &c.:*

> That, in all courts all persons of all persuasions may freely appear in their own way, and according to their own manner, and there personally plead their own cause themselves; or, if unable, by their friends . . . .[19]

Inclusion of this provision by William Penn is particularly significant, for only twelve years earlier in his trial for inciting a riot by preaching in Grace Church Street without a permit[20] he and his co-defendant requested at the outset that the court "promise me a fair hearing, and liberty of making my defense."[21] The court granted Penn's request, and the jury ultimately acquitted him of any wrongdoing.[22]

The right of self-representation was reiterated by several colonies in the period immediately following the Declaration of Independence. Article IX of the *Pennsylvania Declaration of Rights* (1776) guaranteed, *inter alia*, "that in all prosecutions for criminal offences, a man hath a right to be heard by himself and his council . . . ." SCHWARTZ, *supra* at 264, 265. The constitutions of Vermont (Article X, 1777) and New Hampshire (Article XV, 1783) contained virtually

[19]*Id.*, at 140.

[20]*The Trial of William Penn*, 6 How. St. Tr. 951 (1670), *cited in Illinois v. Allen*, 397 U.S. 337, 351, 353 (1970) (Douglas, J., concurring).

[21]"The People's Ancient and Just Liberties Asserted, in the Trial of William Penn and William Mead, 1670," reproduced in SCHWARTZ, *supra* at 144, 147.

[22]*Id.*, at 153-54.

identical guaranties.[23] The *Georgia Constitution* (1777) in regulating the unauthorized practice of law, stressed that its provisions against unlicensed practitioners were "not intended to exclude any person from that inherent privilege of every freeman, the liberty to plead his own cause."[24]

Article IX of the *Pennsylvania Declaration of Rights* (1776) was again the model for other state constitutions when in 1792 Delaware adopted a provision that "in all criminal prosecutions the accused hath a right to be heard by himself and his counsel."[25] Georgia later adopted a provision which varied slightly, guaranteeing that "no person shall be detained from advocating or defending his cause before any court or tribunal, either by himself or counsel or both."[26]

These early expressions of the fundamental nature of the right to represent oneself *pro se* in criminal trials became the models for similar guarantees by most other states. Four state constitutions presently guarantee that an accused in a criminal prosecution shall have a right to be heard either by himself *or* by counsel *or both.*[27] Three others provide for the right to appear and defend

[23]SCHWARTZ, *supra* at 323, 377.

[24]Article LVIII, *Id.*, at 291, 300.

[25]DELAWARE CONSTITUTION (1972) Article I, §7, quoted in BEANEY, *supra* at 20.

[26]GEORGIA CONSTITUTION (1798) Article III, §8, quoted in BEANEY, *supra* at 19.

[27]16 FLA. CONST. DECLARATION OF RIGHTS, §11 MISS. CONST. ART. 3, §26; TEX. CONST. ART. 1, §10; S.C. CONST. ART. 1, §18.

in person *or* by counsel.[28] Two more guarantee that an accused may be heard by himself, *and* counsel, *or either.*[29] Twenty-seven other state constitutions guarantee the right of the accused to be heard, or to defend in person, or by himself, *and* by counsel.[30] Hence, thirty-six states presently regard the right to self-representation as so fundamental as to require inclusion in their constitutions. The fundamental nature of the right to self-representation is thus firmly established by express recognition of the right in early American declarations of rights.

The absence of such express language in the Fifth and Sixth Amendments does not detract from the fundamental nature of the right. Section 35 of the Judiciary Act of 1789, 1 Stat. 73, 92 (1789), passed by

[28]KAN. CONST. BILL OF RIGHTS, §10; MASS. CONST. PART 1, ART. 12; NEB. CONST. ART. 1, §11.

[29]ALA. CONST. ART. 1 §6; ME. CONST. ART. 1, §6.

[30]ARIZ. CONST. ART. 2, §24; ARK. CONST. ART. 2 §10; COLO. CONST. ART. 2. § 16; CONN. CONST. ART. 1, §8; DEL. CONST. ART. 1, §7; IDAHO CONST. ART. 1, §13; ILL. CONST. ART. 1, §8; IND. CONST. ART. 1, §13; KY. CONST. BILL OF RIGHTS, §11; MO. CONST. ART. 1, §18(a); MONT. CONST. ART. 3, §16; NEV. CONST. ART. 1, §8; N.H. CONST. BILL OF RIGHTS, ART. 15; N.M. CONST. ART. 2, §14; N.Y. CONST. ART. 1, §6; N.D. CONST. ART. 1, §13; OHIO CONST. ART. 1, §10; OKLA. CONST. ART. 2, §20; ORE. CONST. ART. 1, §11; PA. CONST. ART. 1, §9; S.D. CONST. ART. 6, §7; TENN. CONST. ART. 1, §9; UTAH CONST. ART. 1, §12; VT. CONST. CHAPTER 1, ART. 10; WIS. CONST. ART. 1, §7; WYO. CONST. ART. 1, §10; WASH. CONST. ART. 1, §22. See also, LA. CONST. ART. 1, §9.

the First Congress one day before Congress proposed the Sixth Amendment did expressly guarantee the right to self-representation to persons accused of crime in the federal courts. Section 35, now embodied in 28 U.S.C. §1654, provided:

> That in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein.

The Court of Appeals for the Second Circuit has held:

> This statute gives more elaborate expression to the meaning of the terse language of the Bill of Rights and indicates, we think, that the Constitutional right to "assistance of counsel' was intended to include the right of defendants in criminal cases 'to plead and manage their own cases personally.'[31]

In addition to these express provisions for self-representation, the necessary effect of other procedural guarantees, granted in the absence of any right to assistance of counsel, assumes that the accused had the right to appear and defend in person. Article 8 of the *Virginia Declaration of Rights* (1776), for example, provided:

> That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favour, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent

[31] *United States v. Plattner*, 330 F.2d 271, 274 (2d Cir. 1964).

> he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land, or the judgment of his peers.[32]

Article VII of the *North Carolina Declaration of Rights* (1776)[33] contains similar procedural guarantees. Yet neither of these declarations provides for the right of assistance to counsel. Absent counsel, the procedural guarantees set forth above would be meaningless *unless* they were written on the assumption that an accused always has the right to represent himself.[34]

The procedural safeguards of the Fifth and Sixth Amendments were modeled, in part, on the language of the Virginia Declaration. Once again, the rights to trial by jury, to be informed of the nature of the accusation, to confront adverse witnesses, and to compel the attendance of favorable witnesses *assume* that the accused has a right to represent himself. Inclusion of the right to assistance of counsel in the Sixth Amendment is and was a supplement to the fundamental right to represent oneself. Aside from the common usage of "assistance", nothing we have discovered in the history of the right to counsel clause remotely suggests that this supplemental right was intended to or regarded as abrogating the right of self-representation.

In sum, the available historical data strongly indicates that the right of an accused to defend himself was, in

[32] Reproduced in SCHWARTZ, *supra* at 234, 235.

[33] SCHWARTZ, *supra* at 286, 287.

[34] As we argue hereafter, the Sixth Amendment's confrontation and compulsory process clauses in like fashion assume and imply a right of the accused to present his own defense. See pp. 41-42, *infra*.

colonial America and in 1789, a fundamental part of the Constitution's protections for those charged with crime.

B. Contemporary Constitutional Principles.

Our point of view may be simply stated at the outset. The guarantees of due process of law and the confrontation and compulsory process clauses of the Sixth Amendment mean, at bottom, that a defendant in a criminal case cannot be deprived of the opportunity to shape and present his defense according to his own lights. It is he who has the ultimate right to decide whether and in what fashion to defend against the charges, what evidence to present, whether to waive certain constitutional rights and defenses, whether to testify or not, and what affirmative defenses should be asserted. He is of course entitled to the assistance of counsel, and if he exercises that right can be deemed to have acceded to the customary allocation of decision making power which leaves to counsel the authority to make fundamental procedural choices. But the defendant cannot be compelled to accept counsel when to do so would, as a matter of local law, deprive him of the power to shape his defense and see it presented in whatever fashion he may desire.

It is almost unthinkable that due process could mean otherwise. It is the *defendant's* liberty and reputation which hang in the balance – not that of the judge, prosecutor or even defense counsel. And it is for *his* protection – and no one else – that each of the

components of due process, including those expressly guaranteed by the Bill of Rights, were designed.

This Court has never had occasion to describe due process in precisely these terms, but it is implicit in a host of decisions which give content to the phrase. For example, it has been long understood that a defendant has a right to be present at all pertinent stages of a criminal trial. *See, e.g., Hopt v. Utah*, 110 U.S. 574 (1884); *Schwab v. Berggren*, 143 U.S. 442 (1892); *Lewis v. United States*, 146 U.S. 370 (1882); *Dowdell v. United States*, 221 U.S. 325 (1892); *Diaz v. United States*, 223 U.S. 442 (1912); *Snyder v. Massachusetts*, 291 U.S. 97 (1934); *Illinois v. Allen*, 397 U.S. 337 (1970). The defendant has the right to present evidence (*e.g., Washington v. Texas*, 388 U.S. 14 (1967)) and to confront the witnesses against him (*e.g. Pointer v. Texas*, 380 U.S. 400 (1965)). He may personally take the stand and testify in his own behalf. See *Ferguson v. Georgia*, 365 U.S. 570, 598, 601 (1961) (concurring opinions). Plainly the latter right can be exercised only by the defendant; and the right to be present has meaning only on the assumption that he will have a role to play beyond that of interested spectator.[35]

The right of an accused to have *his* defense presented as *he* sees fit is not found solely in generalized principles of due process. It is implicit in the Sixth Amendment itself – not simply as a right to waive the right to

[35]Moreover, as previously noted, the courts require that the exercise or waiver of certain fundamental rights – the right to jury trial and the right to testify – are matters as to which the defendant's wishes are controlling irrespective of the views of counsel. See note 4, *supra*.

counsel, but rather in the confrontation and compulsory process clauses. The Sixth Amendment expressly guarantees "*the accused*" the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." Thus while the right of a defendant to be present was originally treated by the Court as a fundamental aspect of due process (*see, e.g., Schwab v. Berggren, supra*), Mr. Justice Black's opinion for the Court in *Illinois v. Allen, supra*, referred to the "Sixth Amendment right to be present." (*Id.*, at 342) The view that the right to be present derives from the confrontation and compulsory process clauses is extremely significant. If the defendant's Sixth Amendment rights to present and challenge evidence could be satisfied by allowing his counsel to exercise th m on his behalf, the defendant's absence from the courtroom while his counsel remained would be insignificant, and the right to be present a little more than an empty formalism. Plainly the Sixth Amendment contemplates a more meaningful rule for the defendant. Thus Justice Cardozo, writing for the Court in *Snyder v. Massachusetts, supra*, explained the right to be present as involving the right of the defendant "to give advice or suggestions *or even to supersede his lawyers altogether and conduct the trial himself.*" *Id.*, at 106 (emphasis added).

In the majority of cases, the defendant will be content to appear with counsel and to permit his attorney to present the defense. Thus what *Powell* and *Gideon* contemplate will ordinarily occur and the goal of assuring due process will be furthered. But where the relationship of trust and confidence between lawyer and client does not exist because the relationship is coerced, then the

necessary consequences of representation become intolerable. The defendant then has a spokesman in whom he may have no confidence, in whom he may be unwilling to confide and who, in any event, is undesired by him. To make matters worse, his counsel will conduct the defense according to *his* judgment. Vital decisions concerning motions to be made, which witnesses will be called and which will not, the shape and theory of the defense, and a host of other fundamental matters, will be made by counsel. Although counsel may consult with his client with respect to each of these decisions, he is neither obligated to do so nor to conduct the defense as the client desires.[36] Without the willing cooperation and trust of his client, the benefits a lawyer can provide rapidly diminish.

In this setting, the vital principle of *Powell* and *Gideon* has no application. The right of an accused to decline counsel and to present his own defense becomes a safety valve of fundamental importance. It rests, as the Court of Appeals for the Second Circuit has recognized, "on two bases":

[36]Disputes between client and counsel will, for obvious reasons, frequently not appear on the record. This is so in the present case. For example, petitioner advises his present counsel that he and the deputy public defender appointed to represent him did not agree on the desirability of calling a witness, one Charles Cunningham, and that the attorney refused to make the necessary efforts to locate this witness. As previously stated (see note 1, *supra*, the refusal of counsel to locate and call this witness was originally asserted by petitioner as an issue for consideration in this Court, but an examination of the record indicates that the record does not fully reveal pertinent facts. The matter does, however, at least illustrate the kinds of difficulties which arise when an accused is compelled to be represented by counsel against his will.

> [The accused] "must have the means of presenting his best defense," and to this end he "must have complete confidence in his counsel." Without such confidence a defendant may be better off representing himself. Moreover, even in cases where the accused is harming himself by insisting on conducting his own defense, respect for individual autonomy requires that he be allowed to go to jail under his own banner if he so desires and if he makes the choice "with eyes open."[37]

The Court of Appeals for the District of Columbia has recently elaborated upon the second of these two distinct themes:

> [A] salient aspect of the *pro se* right, in our view, is directed to considerations distinct from the objective of achieving what would be the best result in the litigation from the lawyer's point of view. As the Supreme Court said in Adams v. United States ex rel. McCann, *supra*, 317 U.S. at 279, 63 S.Ct. at 241, the "right to dispense with a lawyer's help . . . rest[s] on considerations that go to the substance of an accused's position before the law." It is designed to safeguard the dignity and autonomy of those whose circumstances or activities have thrust them involuntarily into the criminal process. An accused has a fundamental right to confront his accusers and his "country," to present himself and his position to the jury not merely as a witness or through a "mouthpiece," but as a man on trial who elects to plead his own cause. He is not obliged to seek what counsel would record as a victory but what he sees as tantamount to condemnation or doubt rather than vindication. A defendant has the moral right to stand alone in his hour of trial. The

[37] *United States ex rel. Maldonado v. Denno*, 348 F.2d 12, 15 (2nd Cir. 1965), *cert. den.*, 384 U.S. 1007 (1966).

> denial of that right is not to be redeemed through the prior estimate of someone else that the practical position of the defendant will be enhanced through representation by another, or the subsequent conclusion that the defendant's practical position has not been disadvantaged.
>
> . . . . Even if the defendant will likely lose the case anyway, he has the right – as he suffers whatever consequences there may be – to the knowledge that it was the claim that he had put forward that was considered and rejected, and to the knowledge that in our free society, devoted to the ideal of individual worth, he was not deprived of his free will to make his own choice, in his hour of trial, to handle his own case.[38]

[38] *United States v. Dougherty*, 473 F.2d 1113, 1128 (D.C. Cir. 1972). See also Comment, *The Right to Appear Pro Se: The Constitution and the Courts*, 64 J. CRIM. L. & CRIMINOLOGY 240, 247 (1973):

> Due process is involved only marginally with who wins or who loses; its primary focus is on how the accused was brought to trial and how his case was tried. The judicial system's credibility depends on this. Crucial to this credibility is the defendant's own determination of his defense, *i.e.*, his trial strategy, his theory of defense, his decision whether or not to take the witness stand. The choice should be left to him because he has the most to lose if the choice is wrong and the community-at-large must not be allowed to believe that the fate of an accused was sealed before trial began due to government dictation as to methods of defense. The same due process considerations that allow a defendant to choose his defense also require that he be allowed the choice of representing himself. Without this right of choice, the defendant becomes a mere spectator at his trial, his destiny to be decided by a system over which others exercise complete control.

These considerations have prompted a clear majority of courts and commentators to find the right to defend *pro se* secured by the United States Constitution. Although the right in federal prosecutions is also conferred by federal statute (28 U.S.C. § 1654), the Second,[39] Third,[40] Fifth,[41] Sixth,[42] Seventh,[43] Eighth,[44] and Ninth[45] Circuits have found the right of self-

[39] *United States v. Plattner*, 330 F.2d 271 (2d Cir. 1964); *United States ex rel. Maldonado v. Denno*, 348 F.2d 12 (2d Cir. 1965), cert. den., 384 U.S. 1007 (1966).

[40] *United States v. Washington*, 341 F.2d 277, 285 (3rd Cir. 1965) *cert. den.*, 382 U.S. 850 (1966). While the court's opinion in *Washington* does not explicitly invoke the constitution, its entire discussion, especially the citation of *United States v. Redfield*, 197 F.Supp. 559 (D. Nev.), *aff.'d per curiam*, 295 F.2d 249 (9th Cir. 1961) *cert. den.*, 369 U.S. 803 (1962) leaves little doubt that the right to defend *pro se* was viewed as of constitutional dimension.

[41] *MacKenna v. Ellis*, 263 F.2d 35 (5th Cir.), *cert. den.*, 360 U.S. 935 (1959).

[42] *United States v. Johnson*, 333 F.2d 1004 (6th Cir. 1964); *United States v. Sternman*, 415 F.2d 1165, 1169-70 (6th Cir. 1969) *cert. den.*, 397 U.S. 907 (1970); *United States v. Condor*, 423 F.2d 904, 907-08 (6th Cir. 1970).

[43] *Lowe v. United States*, 418 F.2d 100, 103 (7th Cir. 1969), *cert. den.*, 397 U.S. 1048 (1970).

[44] *United States v. Warner*, 428 F.2d 730, 733 (8th Cir.1970), *cert. den.*, 400 U.S. 930 (1970); but see *Butler v. United States*, 317 F.2d 249 (8th Cir.), *cert. den.*, 375 U.S. 838 (1963) (concluding that right purely statutory).

[45] *Reynolds v. United States*, 267 F.2d 235 (9th Cir. 1959) (per curiam); *Bayless v. United States*, 381 F.2d 67, 71 (9th Cir. 1967); *Arnold v. United States*, 414 F.2d 1056, 1058 (9th Cir. 1969) *cert. den.*, 396 U.S. 1021 (1970); *Haslam v. United States* 431 F.2d 362, 365 (9th Cir. 1970) *cert. den.*, 402 U.S. 976 (1971).

representation to be of constitutional dimension.[46] The great weight of scholarly commentary is the same effect.[47] Likewise, the preponderance of state courts

[46] The Tenth Circuit, by contrast, has referred to the right as derived from the statute (*Van Nattan v. United States*, 357 F.2d 161 (10th Cir. 1966) while the District of Columbia Circuit, which previously appeared to view the right as merely statutory (see *Brown v. United States*, 264 F.2d 363 (D.C. Cir.), *cert. den.*, 360 U.S. 911 (1959)) now considers the issue open in that Circuit. See *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972).

[47] Comment, *Self-Representation in Criminal Trials: The Dilemma of the Pro Se Defendant*, 59 CALIF. L. REV. 1479 (1971) (hereafter cited as "*Self-Representation*") is the most frequently cited. See also Note, *The Right of An Accused to Proceed Without Counsel*, 49 MINN. L. REV. (1965), Note, *The Right to Defend Pro Se*, 3 TEX. TECH. L. REV. 89 (1971); Comment, *Jury Nullification and the Pro Se Defense: The Impact of Doughterty v. United States*, 21 KAN. L. REV. 48 (1972); Comment, *People v. Sharp: Death Knell For Pro Se Representation in Criminal Trials in California?* 24 HAST. L.J. 431 (1973); Note, *Where is the Constitutional Right to Self Representation and Why is the California Supreme Court Saying All Those Terrible Things About It?*, 10 CALIF. WESTERN L. REV. 196 (1973); Comment, *The Right to Defend Pro Se in Criminal Proceedings*, 1973 WASH. U. L. Q. 679 (1973); Comment, *The Right to Appear Pro Se: The Constitution and the Courts*, 64 J. CRIM. L. & CRIMINOLOGY 240 (1973).

Articles to the contrary are *Grano, The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175 (1970); Note, *Criminal Procedure – Right to Defend Pro Se*, 48 N. CAR. L. Rev. 678 (1970).

respect the right to defend *pro se*, variously on state law and federal law grounds.[48]

The fundamental importance of the right of an accused "personally to manage and conduct his own defense in a criminal case" (*United States v. Plattner, supra*, note 39, at 274) may unfairly be denigrated if one perceives those seeking to exercise that right as bent upon converting our courtrooms into political forums or inclined to disruption of orderly judicial proceedings. The available evidence suggests far more conventional motives on the part of those seeking to present their own defense – motives which, indeed, largely reflect the enormous power

[48]*See, e.g., State v. Capetta*, 216 So.2d 749 (Fla. 1968), *cert. den.*, 394 U.S. 1008 (1969); *Lockhart v. State*, 92 Idaho 813, 451 P.2d 1014 (1969); *People v. Nelson*, 47 Ill. 2d 253, 268 N.E. 2d 2 (1971); *Blanton v. State*, 229 Ind. 701, 98 N.E. 2d 186 (1951); *Westberry v. State*, 254 A.2d 44 (Me. 1969); *Allen v. Commonwealth*, 324 Mass. 558, 87 N.E. 2d 192 (1949); *People v. Haddad*, 306 Mich. 556, 11 N.W. 2d 240 (1943); *State v. McGhee*, 184 Neb. 352, 167 N.W.2d 765 (1969); *Zasada v. State*, 19 N.J. Super. 589, 89 A.2d 45 (1952); *People v. McLaughlin*, 291 N.Y. 480, 53 N.W. 2d 356 (1944); *State v. Mems*, 281 N.C. 658, 190 S.E. 2d 164 (1972); *State v. Verna*, 9 Ore. App. 620, 498 P.2d 793 (1972); *State v. Tomlinson*, 78 S.D. 235, 100 N.W.2d 121 (1960); *State v. Penderville*, 2 Utah 281, 272 P.2d 195 (1954); *State v. Woodall*, 5 Wash.App. 901, 491 P.2d 680 (1971). *But cf. People v. Kirkland*, 40 Mich.App. 22, 198 N.W.2d 811 (1972) (distinguishing *People v. Haddad, supra*).

reposed in counsel once a defendant accepts representation by an attorney.[49]

The instances in which a defendant seeks to represent himself for what might be viewed as "political" considerations are few. Only one of the reported[50]

[49]An additional factor which may impel some defendants to waive counsel is financial. A defendant whose resources are slightly in excess of the indigency line may fear the ecomonic burdens which would be imposed if counsel is retained. And in some jurisdictions the indigent defendant may face liability under a recoupment statute of the kind upheld in *Fuller v. Oregon*, ___ U.S. ___, 40 L.Ed. 2d 642 (1974). California has a similar provision, which provides that if the trial court finds the defendant has a "present ability to pay all or part of the cost" of counsel it shall order him to reimburse the county "in any installments and manner which it believes reasonable and compatible with his financial ability." CALIF. PEN. CODE §987.8. The constitutionality of the section was recently upheld by the Supreme Court of California. *People v. Amor*, ___ Cal. 3d ___, ___ Cal. Rptr. ___, ___ P.2d ___ (Crim. 17473, decided July 9, 1974).

[50]The recent unreported trial in Santa Clara County, California of Angela Davis is sometimes incorrectly cited as an illustration of a defendant seeking self-representation for "political" reasons. She sought, and was granted, the right to act as her own co-counsel. The reasons given by her, which evidently were persuasive to the trial judge, stressed a desire to participate in the defense process in a conventional way:

> I am not talking about trying to create a political forum in this courtroom; I am not talking about making irrelevant political remarks; I'm talking about being able to make arguments, being able to make motions, objections, and being able to examine witnesses when it becomes clear that I am the most competent person in the legal team to do so.

Quoted in *Self-Representation*, at 1506. Defendant Davis was acquitted following a trial in which her participation, by all accounts, was orderly and entirely in line with her representations to the trial court.

California decisions even remotely involves this factor.[51] The bulk of the cases involve expressions of a belief by the defendant that he, and not a lawyer, is the best person to present all or part of the defense. There is evidence that a high percentage of those seeking to present their own defense do so out of a strong belief in their own innocence. See *The Right to Appear Pro Se*, at 248 & n.110. Many defendants express a lack of confidence in counsel; in some instances, this mistrust is directed at lawyers generally, and in others at the particular attorney assigned by the court or by the public defender's office to represent the accused. See *The Right to Appear Pro Se, supra* at 248 & n.111, n.113; Appendix A; *Self-Representation*, at 1499-1502. That was Petitioner's motivation in seeking to represent himself. He expressed concern because the public defender's office was "very loaded down with its, you know, a heavy case load." (A. 35).

The point, of course, is not that the defendant's perceptions in every instance are correct or even reasonable; many court appointed attorneys and public defenders are highly competent and dedicated. It is not our purpose to question the assumption of *Powell* and

[51]In an Appendix to this Brief, we have summarized the reported California cases involving the right of self-representation for the purpose of indicating the reasons given by the accused and other pertinent facts. This analysis is hereafter cited as "Appendix A." The one case involving a motive for self-representation which some might view as "political" is *People v. Marcus*, 133 Cal. App. 2d 579 284 P.2d 848 (1955).

Another attempt to determine the circumstances and motives leading to demands for self-representation was made in Illinois by inquiry of 99 trial judges. *The Right to Appear Pro Se*, note 47, *supra*.

Gideon that representation by counsel is fundamental to the fair trial of a defendant who desires representation. But regrettably there is ample evidence that less than diligent representation in this nation's criminal courts is far from a freakish exception. Serious concerns recently have been expressed by The Chief Justice (see Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to our System of Justice?*, 42 FORD. L. REV. 227 (1973)), who suggests as a "working hypothesis that from one-third to one-half of the lawyers who appear in the serious cases are not really qualified to render fully adequate representation."

In many communities, the public defender provides a generally high level of representation, at least for serious offenses. In others, however, the public defender is burdened with a crushing caseload. See PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORTS: THE COURTS 55-56 (1967). And where public defender offices do not exist or, as in the District of Columbia, are inadequately staffed to meet the needs of all defendants, systems for appointing private counsel produce uneven results. See *United States v. Chatman*, D.C. Super. Ct., Crim. No. 28539-74, decided May 7, 1974, 42 U.S.L. Week 2593 (1974).

In many communities, a large proportion of criminal cases are defended by lawyers whose office is the local criminal court and whose practice is operated on "a mass production basis." TASK FORCE REPORT, at 32. They have recently been characterized as "a cadre of mediocre lawyers who wait in the courtroom in the hopes of

receiving an appointment" and have "more expertise at extracting a fee . . . than in defending a criminal case." ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES (app. draft 1971). As the President's Commission on Law Enforcement and the Administration of Justice put it:

> In many lower courts defense counsel do not regularly appear, and counsel is either not provided to a defendant who has no funds; or, if counsel is appointed, he is not compensated. The Commission has seen, in the "bullpens" where lower court defendants often await trial, defense attorneys demanding from a potential client the loose change in his pockets or the watch on his wrist as a condition of representing him. Attorneys of this kind operate on a mass production basis, relying on pleas of guilty to dispose of their caseload. They tend to be unprepared and to make little effort to protect their clients' interests.
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> * * * *
>
> Few in number, these lawyers typically carry large case loads and in many cities dominate the practice in routine cases. They frequent courthouse corridors, bondsmen's offices, and police stations for clients, and rely not on legal knowledge but on their capacity to manipulate the system. Their low repute often accurately reflects the quality of services they render.[52]

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[52]THE CHALLENGE OF CRIME IN A FREE SOCIETY, 29, 152 (1967). See also Grano, note 47, *supra*, at 1197-98; Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U. L. REV. 289, 306-09 (1964); Oakes and Lehman, *The Criminal Process of Cook County and the Indigent Defendant*, 1966 UNIV. OF ILL. L. FORUM 584, 693 (1966).

Of course relief is available, by appellate review or in post-conviction proceedings, for extreme cases of ineffective representation. See Part I, *supra*, at pp. 23-24. But what answer does our system have for the defendant whose counsel was inept but whose representation was not so grotesque that the trial was "reduced . . . to a 'farce or a sham' "?[53] Those defendants who know best the answer to that question frequently seek to conduct their own defense.

It should be stressed, however, that the right of an accused to conduct his own defense ought not to turn on whether his negative perceptions of the quality of counsel available to him are correct or even debatable. The judgment of the accused may, viewed objectively, be unfair. The counsel he spurns may be highly dedicated and competent. The point is that the defendant *has* those perceptions, and they are unlikely to be diminished if the outcome is a conviction. Thus there is practical wisdom in the observation of the Second Circuit, quoted earlier, that "even in cases where the accused is harming himself by insisting on conducting his own defense, respect for individual autonomy requires that he be allowed to go to jail under his own banner if he so desires and choose 'with eyes open.' " *United States ex rel. Maldonado v. Denno*, *supra*, at 15.

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[53]*People v. Ibarra*, 60 Cal.2d 460, 464, 34 Cal.Rptr. 863, 386 P.2d 487 (1963).

III.

THERE ARE NO CONSIDERATIONS OF JUDICIAL ADMINISTRATION WHICH WARRANT NON-RECOGNITION OF THE RIGHT OF SELF-REPRESENTATION.

It is sometimes suggested that recognition of a right to defend *pro se* presents a dilemma:

> ... court denies the defendant the right, it has provided the defendant grounds for appeal in that he was denied his constitutional right to self representation. If the court grants the motion to proceed *pro se*, it may have provided the clever defendant with an opportunity to lay grounds for appeal on a claim of denial of fair trial because the defense which he conducted was inadequate and incompetent.[54]

The answer to this "dilemma" is that it does not exist. A defendant who represents himself is not entitled to privileges or indulgences other than those enjoyed by counsel or other defendants represented by counsel. See *Self-Representation, supra*, at 1496. He does not "acquire the right to have the court act as his counsel whenever he seem[s] to be blundering." *Burnstein v. United States*, 178 F.2d 665, 670 (9th Cir. 1949); see also *Michener v. United States*, 181 F.2d 911, 918 (8th Cir. 1950). As the California Supreme Court has said, the *pro se* defendant "assumes for all purposes connected with his case, and must be prepared to be treated as having, the

[54]Note, *Where is the Constitutional Right to Self Representation and Why is the California Supreme Court Saying All Those Terrible Things About It?*, 10 CALIF. WEST. L. REV. 196, 209 (1973).

qualifications and responsibilities concomitant with the role he has undertaken." *People v. Mattson*, 51 Cal.2d 777, 794, 336 P.2d 937 (1959). All that is required, then, is that the trial court act with care to ensure that the defendant who asks to represent himself knowingly and intelligently has waived his right to counsel (see Part IV, *infra*); that having been accomplished, the *pro se* defendant will not be heard to complain of the quality of his own performance.[55]

Moreover, nothing in the Constitution *prevents* trial judges from taking steps to ensure that a *pro se* defendant receives a trial which is, measured by objective standards, procedurally correct. Although trial judges are not required to assist a *pro se* defendant, "it is common practice in both civil and criminal trials for trial judges, by advice and suggestion, to assist persons who represent themselves." *People v. Redmond*, 71 Cal.2d 745, 758, 79 Cal.Rptr. 529, 457 P.2d 321 (1969); see also *United States v. Odom*, 423 F.2d 875, 877 (9th Cir. 1970) (commenting on care taken by trial judge to protect rights of *pro se* defendant).

Similarly, the trial court may appoint "standby counsel" to provide such assistance as the defendant may need and want. *See, e.g., United States v. Spencer*, 439 F.2d 1047, 1051-52 (2d Cir. 1971); *Bayless v. United States*, 381 F.2d 67, 71 (9th Cir. 1967); *Brown v. United States*, 264 F.2d 363, 369 (D.C. Cir. 1959) (Burger, J., concurring opinion), *cert. den.*, 360 U.S. 911

[55]We know of no case which grants the defendant relief on the ground that his representation of himself was incompetent. Surely courts would reject such claim unhesitatingly, for a defendant can be bound by the consequences of his knowing and intelligent acts. *Cf. North Carolina v. Alford*, 400 U.S. 25 (1970); *Brady v. United States*, 397 U.S. 742 (1970).

(1959). That procedure has long been available in California (see *People v. Carter*, 66 Cal. 2d 666, 671; *People v. Mattson*, 51 Cal. 2d 777, 794 (1959)), and is highly desirable. See *Mayberry v. Pennsylvania*, 400 U.S. 455, 467-68 (1971) (Burger, C.J., concurring); AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE §6.7 (App. Draft 1972):

> When a defendant has been permitted to proceed without the assistance of counsel, the trial judge should consider the appointment of standby counsel to assist the defendant when called upon and to call the judge's attention to matters favorable to the accused upon which the judge should rule on his own motion. Standby counsel should always be appointed in cases expected to be long or complicated or in which there are multiple defendants.[56]

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[56]The Commentary to §6.7 states:

> Once the judge has . . . permitted an accused to appear *pro se*, he should not foist a lawyer on the accused by permitting standby counsel to examine and cross-examine witnesses or make arguments over defendant's objection. Nonetheless, in all but the simplest trials, and perhaps even in those if availability of counsel permits, the court should ordinarily appoint standby counsel to assist the accused if and when called upon, and to perform the very limited independent role contemplated by this standard. [citation]. Normally, of course, the accused will very quickly recognize the value of counsel and will consent to being represented by the standby. Before effecting the change in roles, however, it would be wise for the judge to explain to the defendant that if he accepts the standby as his counsel, the lawyer and not the accused will conduct the defense thereafter . . . .

(footnote continued on next page)

It remains only to say that respect for the right of the accused to conduct his own defense in no way requires trial courts to tolerate abuse of the right by disruptive conduct. A defendant, no less than a lawyer, is entitled to conduct the defense forcefully and effectively; but defendant and counsel alike must observe the requirements of courtroom protocol. Reported instances of disruption by defendants allowed to represent themselves are rare.[57] But for those who do not conform their demeanor to the requirements of the court there are swift and effective remedies. The power of contempt, exercised in conformity with the requirements of due process (see *Mayberry v. Pennsylvania, supra*), is one remedy; termination of the right of self-representation is another (see *United States v. Dougherty*, 473 F.2d 1113, 1125 (D.C. Cir. 1972)); and in extreme cases the defendant may be removed from the courtroom. *Illinois v. Allen*, 397 U.S. 337 (1970).

Id., at 87. The role contemplated by the ABA Project thus is somewhat more circumscribed than that suggested by The Chief Justice in *Mayberry v. Pennsylvania, supra*, in which it was proposed that standby counsel "perform all the services a trained advocate would perform ordinarily by examination and cross-examination of witnesses, objecting to evidence, and making closing argument." 400 U.S., at 467-68.

[57]*Mayberry v. Pennsylvania*, is of course the best known exception; and as that decision makes clear courts are not without remedy for such instances. That *Mayberry* is indeed the exception and not the rule appears clearly after an examination of all of the reported California self-representation cases. We have found *no* cases of defendants who, having been allowed to defend *pro se*, abused the right and engaged in courtroom disruption. See Appendix A.

There is, as noted, little reason to fear that permitting defendants to conduct their own defense will generate problems of this nature, for there is no evidence from the experiences of the federal courts or the state courts which respect the right of self-representation that disruption is a significant factor. See note 57, *supra*. Doubtless most defendants who seek to plead their own cause are sincere in their actions and wisely perceive that, as The Chief Justice has said, "the rules of professional manners and professional etiquette . . . are essential for effective trial advocacy." Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice*, 42 FORD. L. REV. 227, 235 (1973).

The right of an accused to conduct his own defense is therefore not inconsistent with the sound and orderly administration of justice. Yet while the arguments which some have made in justification for denial of that right are frequently overdone, doubtless the *pro se* defendant imposes some extra burdens upon the system of justice. We submit those burdens are tolerable, and amply justified by considerations of fundamental fairness:

> [T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.[58]

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[58] *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

IV.

A DEFENDANT SHOULD NOT BE DENIED THE RIGHT OF SELF-REPRESENTATION IF TIMELY ASSERTED UNLESS HIS WAIVER OF THE RIGHT TO COUNSEL IS NOT KNOWING AND INTELLIGENT.

Exercise of the right to defend *pro se* often[59] involves a relinquishment of the Sixth Amendment right to the assistance of counsel. Where the trial court does not intend to appoint standby counsel,[60] then it must

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[59] We use the word "often" advisedly, for it is possible and common for a defendant to proceed *pro se*, while receiving such "assistance" from standby counsel as he desires. See pp. 55-56, *supra*. That would surely satisfy the requirements of the Sixth Amendment. Thus it is not correct to state, as some have, that the right to defend *pro se* and to enjoy the assistance of counsel "cannot be both exercised at the same time." *United States v. Mitchell*, 137 F.2d 1006, 1010 (2nd Cir. 1943) *cert. den.*, 321 U.S. 794 (1944).

[60] Whether a defendant who wishes to defend *pro se* has a constitutional entitlement to the appointment of a standby counsel is a question not presented on this record. Petitioner Faretta did not demand the assistance of counsel and unequivocally waived that right on the record. See A. 39-40. The weight of authority appears to be that a defendant who exercises his right to defend *pro se* is not also entitled the appointment of a standby counsel. *See, e.g., United States v. Mitchell, supra; United States v. Private Brands, Inc.* 250 F.2d 554, 557 (2d Cir. 1957) *cert. den.*, 355 U.S. 957 (1958); *Duke v. United States*, 255 F.2d 721, 725 (9th Cir. 1958) *cert. den.*, 357 U.S. 920 (1958); *Brasier v. Jeary*, 256 F.2d 474, 476 (8th Cir. 1958) *cert. den.*, 358 U.S. 867 (1958); *Shelton v. United States*, 205 F.2d 806, 813 (5th Cir.), petition for cert. *dismissed on petitioner's motion*, 346 U.S. 892 (1953), *motion to vacate denied*, 349 U.S. 943 (1955). This is the view of the California Supreme Court. *People v. Mattson*, 51 Cal.2d 777, 336 P.2d 937 (1959). As suggested earlier, the appointment of standby counsel, even if not constitutionally compelled, is highly desirable.

determine whether the defendant's waiver meets the *Johnson v. Zerbst* standard of an "*intentional* relinquishment or abandonment of a *known* right or privilege." 304 U.S. 458, 464 (1938) (emphasis added). This Court has characterized the issue as whether the defendant "knows what he is doing and [whether] his choice is made with eyes open." *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942). A trial judge will, of course, be required to "investigate as long and as thoroughly as the circumstances of the case before him demand" (*Von Moltke v. Gillies*, 332 U.S. 708, 723-24 (1948)) to be sure that the defendant understands that he is entitled to counsel and knowingly and intelligently chooses to waive that right. The Court of Appeals in *United States v. Plattner*, 330 F.2d 271, 276 (2d Cir. 1964) aptly described the proper and necessary inquiry:

> [I]t is incumbent upon the presiding judge, by recorded colloquy with the defendant, to explain to the defendant: that he has the choice between defense by a lawyer and defense *pro se;* that, if he has no means to retain a lawyer of his own choice, the judge will assign a lawyer to defend him, without expense or obligation to him; that he will be given a reasonable time within which to make the choice; that it is advisable to have a lawyer, because of his special skill and training in the law and that the judge believes it is in the best interest of the defendant to have a lawyer, but that he may, if he elects to do so, waive his right to a lawyer and conduct and manage his defense himself. If the result is a waiver of the right to counsel and an election to defend *pro se*, the presiding judge should conduct some sort of inquiry bearing upon the defendant's capacity of making an intelligent choice. In other words, there must be a record sufficient to establish to our satisfaction that the defendant "knows what he is doing and his choice is made with eyes open."[61]

The issue, however, is not whether the defendant is a skilled trial advocate or learned in the law. That was the view of the trial court in this case, which quizzed petitioner Faretta at great length concerning his knowledge of the exceptions to the hearsay rule, the number of available challenges to jurors and the grounds for challenge, and related matters. A. 46-48), quoted at pp. 7-9, *supra*. The trial court's dissatisfaction with petitioner's answers was the sole basis, so far as the record discloses, for its conclusory finding that Faretta did not make "an intelligent and knowing waiver of his constitutional right to be represented by an attorney." (A. 48).[62] Unless the right to defend *pro*

---

[61] A model dialogue between trial judge and defendant has been suggested by Judge Ely in *Hodge v. United States*, 414 F.2d 1040, 1048-49 note E (9th Cir. 1969) (dissenting opinion), and is reproduced here in Appendix B. While the majority of that court evidently did not view it as constitutionally required, presumably any trial judge who observed that or a like procedure will have made a record unlikely to be questioned.

[62] The trial judge left little doubt that the cause for the reversal of its prior order allowing petitioner to defend *pro se* was the intervention of the decision of the California Supreme Court in *People v. Sharp*, 7 Cal.3d 448, 103 Cal.Rptr. 233, 499 P.2d 489 (1972) *cert. den.*, 410 U.S. 944 (1973). *Sharp* was decided on July 7, 1972; the order revoking petitioner's *pro se* status was made six days later on July 13, 1972. The trial court expressly acknowledged that *Sharp* influenced its decision. (A. 48).

se can be made contingent upon the ability of the accused to pass an informal examination regarding his legal skills, there can be no question that the trial judge erred, for there would have been no basis on the record for concluding that petitioner lacked a full appreciation for his right to counsel and the consequences of waiving it.

As the Ninth Circuit put it in *Hodge v. United States*, 414 F.2d 1040, 1043 (9th Cir. 1969) (en banc):

> The question before the judge was not whether the defendant was professionally capable of acting as his own lawyer. Few defendants are, and the right of self-representation is not so conditioned. The question was simply whether the defendant understood the charges against him and was fully aware that he would be on his own in a complex case area where experience and professional training are greatly to be desired.[63]

Accordingly, when the defendant prior to trial[64] makes a request for leave to defend *pro se*, the trial

[63]See also *Self-Representation, supra*, 1495-96 n.100 and authorities cited.

[64]This case does not present for decision the question of whether a defendant who does not seek to defend *pro se* until trial has commenced may be denied that right in the discretion of the trial court. That he may seems to be the prevailing view. See *Self-Representation, supra*, at 1485 & n.44, and authorities cited. We confess the some difficulties with the distinction, at least in the severity with which it has been drawn. We certainly do not contend that recognition of the right to defend *pro se* as petitioner urges here would mechanically result in a requirement that the right be recognized whenever asserted. The Court has said that courts "may attach reasonable time limitations to the assertion of federal constitutional rights." *Michel v. Louisiana*, 350 U.S. 91, 97 (1956). *See, e.g., Davis v. United States*, 411 U.S. 233 (1973) (challenge to grand jury selection must be made prior to trial). However, the denial of the right to defend *pro se* seems particularly harsh when it is asserted by a defendant as a result of a bona fide conflict with trial counsel over matters of trial strategy. Where the defendant shows that the disagreement did not exist until after commencement of trial and where counsel insists (as the authorities cited in Part I, *supra*, suggest he may) that his view prevail, then denial of the right to proceed *pro se* seems to us difficult to defend.

We believe a fair balance can be struck between the interests of dedendants who, after trial commences, legitimately assert for the first time the right to defend *pro se*, on the one hand, and the interests of the prosecution and trial court on the other. Where no justification for the delayed assertion is given, presumably it may be denied. Moreover, where the defendant is permitted to proceed *pro se* in mid-trial, the court is under no obligation to grant a continuance or otherwise delay the proceedings. *See, e.g., United States ex rel. Maldonado v. Denno*, 348 F.2d 12, 16 (2d Cir. 1965), *cert. den.*, 384 U.S. 1007 (1966).

court must permit him to do so unless, after careful inquiry, it is unable to say that the defendant has truly made the choice "with eyes open."

V.

DENIAL OF THE RIGHT OF SELF-REPRESENTATION REQUIRES REVERSAL.

The Court acknowledged in *Chapman v. California*, 386 U.S. 18, 23 (1967) that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." It

gave as examples the decisions establishing the right to counsel, the prohibition against use of a coerced confession, and the right to an impartial judge. See *id.*, at n.8. Plainly no defendant, however overwhelming the evidence of guilt, can be convicted without counsel or by a biased judge. For much the same reason, application of the harmless error rule would be wholly inappropriate in the context of the right to self-representation.[65] As we have shown, the right to defend *pro se* derives not merely from the need to provide the most reliable fact-finding process; equally at issue is the question of the fundamental fairness of a process which denies the defendant, whose liberty is at stake, the right to control the presentation of his defense if he so chooses. There simply could never be a denial of the right of self-representation which is, in that sense, "harmless." See *United States v. Plattner, supra,* at 273.

Moreover, as the Court of Appeals recognized in *United States v. Dougherty*, 473 F.2d 1113, 1148 (D.C. Cir. 1972), "if the conventional doctrine of harmless error is applied, it will in effect undercut the right of *pro se* representation, since rarely if ever can there be a showing of prejudice in terms of result from the conduct of a trial by counsel." Rejecting the harmless error approach, the Court of Appeal concluded that

[65]The question of harmless error, of course, is entirely distinct from the issue of retroactivity, an issue we have not addressed inasmuch as petitioner, the first litigant to bring the issue to this Court, is in all events entitled to the benefits of any decision the Court may render. See *Stovall v. Denno*, 388 U.S. 293, 301 (1967).

"the defendant is entitled to a trial at which he is accorded his right to represent himself." *Id.*

CONCLUSION

Petitioner, whose capacity freely and intelligently to waive the right to counsel cannot fairly be disputed, was denied the right to defend *pro se*. As a consequence, he was convicted following a trial at which he was represented by a counsel he did not choose nor desire. The right to defend *pro se* is a fundamental ingredient of due process, and its denial to petitioner requires that the judgment below be reversed.

Dated: July 19, 1974

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APPENDIX A

ANALYSIS OF REPORTED CALIFORNIA CASES INVOLVING THE RIGHT OF SELF-REPRESENTATION

This Appendix reflects an analysis of every reported California appellate decision involving the right of self-representation.* Our purpose was to examine the cases to determine the reasons expressed by defendants for seeking to defend *pro se* and to see if there were grounds for the occasionally expressed concern that the right of self-representation is most frequently asserted in "political" cases and that disruptive, obstructive conduct by the *pro se* defendant is a common phenomenon. It will be noted that in a high percentage of the cases the defendant was allowed to represent himself which reflects the pre-*Sharp* California rule recognizing the right. See Brief, note 2, *supra*.

Scrutiny of the reported decisions brings three points into sharp focus. *First*, the typical explanation given by

*Every case cited in the annotated statutes under Article I, Section 13 of the California Constitution and Section of the California Penal Code in the subsections dealing with self-representation in criminal trial proceedings has been examined. While there may be a small number of cases overlooked by the editors of the annotated statutes, so far as we can determine this Appendix is exhaustive and certainly presents a fair picture of the right of self-representation insofar as it emerges from the reported decisions. We have excluded the few self-representation cases involving appeals and post-conviction proceedings. We have also excluded a few cases in which the defendant did not object to having counsel handle the case generally but who simply sought to speak at one point in the proceedings.

the defendant seeking to present his own defense is dissatisfaction with his counsel (typically the public defender or appointed counsel) and even an express disagreement over trial strategy. *Second*, of the 76 cases which were examined, only one could remotely be regarded as involving a "political" motivation underlying the defendant's desire to defend himself.* *Third*, in *none* of the 44 cases in which the defendant was permitted to defend himself was there any disruptive or obstructive conduct.

We have simply listed the cases examined, under appropriate headings; where the reported decision indicates the defendant's apparent motive for seeking to present his own defense, that is shown in a parenthetical after each citation.

CASES IN WHICH THE DEFENDANT WAS ALLOWED TO REPRESENT HIMSELF AND DID SO IN AN ORDERLY FASHION

(1) *People v. Williams*, 2 Cal.3d 894, 88 Cal.Rptr. 208, 471 P.2d 1008 (1970) (Disagreement between defendant and counsel over trial strategy).

(2) *People v. Robles*, 2 Cal.3d 205, 85 Cal.Rptr. 166, 466 P.2d 710 (1970) (Defendant's reasons not stated).

(3) *People v. Redmond*, 71 Cal.2d 745, 79 Cal.Rptr. 529, 457 P.2d 321 (1969) (Defendant's reasons not stated).

(4) *People v. Vaughn*, 71 Cal.2d 406, 78 Cal.Rptr. 186 (1969) (Disagreement between defendant and

*People v. Marcus, 133 Cal.App.2d 574, 284 P.2d (1955).

counsel over trial strategy).

(5) *People v. Maddox*, 67 Cal.2d 647, 63 Cal.Rptr. 371 (1967) (Disagreement between defendant and counsel over trial strategy).

(6) *People v. Carter*, 66 Cal.2d 666, 58 Cal.Rptr. 614, 427 P.2d 214 (1967) (Dissatisfaction with counsel).

(7) *People v. Robinson*, 62 Cal.2d 889, 44 Cal.Rptr. 762, 402 P.2d 834 (1965) (Defendant's reasons not stated).

(8) *People v. Martin*, 60 Cal.2d 615, 35 Cal.Rptr. 769, 387 P.2d 585 (1963) (Defendant's reasons not stated).

(9) *People v. Lopez*, 60 Cal.2d 223, 32 Cal.Rptr. 424, (1963) (Defendant's reasons not stated).

(10) *People v. Ashley*, 59 Cal.2d 339, 29 Cal.Rptr. 16 (1963) (Defendant's reasons not stated).

(11) *People v. Thomas*, 58 Cal.2d 121, 23 Cal.Rptr. 161, 373 P.2d 97 (1962) (Defendant's reasons not stated).

(12) *People v. Linden*, 52 Cal.2d 1, 338 P.2d 397 (1959) (Dissatisfaction with counsel).

(13) *People v. Mattson*, 51 Cal.2d 777, 336 P.2d 937 (1959) (Defendant wanted to participate and did not want counsel if that meant he could not do so).

(14) *People v. Jones*, 16 Cal.App.3d 837, 94 Cal.Rptr. 312 (1971) (Defendant wanted to represent himself because of dissatisfaction with public defender's office generally, and dissatisfaction with the particular deputy assigned to him).

(15) *People v. Johnson*, 13 Cal.App.3d 1, 91 Cal.Rptr. 203 (1970) (Did not desire to be represented

by public defender).

(16) *People v. Tracy*, 12 Cal.App.3d 94, 90 Cal.Rptr. 375 (1970) (Unhappy with public defender).

(17) *People v. Sneed*, 8 Cal.App.3d 963, 88 Cal.Rptr. 32 (1970) (Defendant's reasons not stated).

(18) *Ligda v. Sup. Ct. of Solano Cty.*, 5 Cal.App.3d 811, 85 Cal.Rptr. 744 (1970) (Defendant expressed lack of confidence in public defender).

(19) *People v. Kellett*, 1 Cal.App.3d 704, 81 Cal.Rptr. 917 (1969) (Defendant felt he could present defense more competently than appointed counsel).

(20) *People v. Armstrong*, 274 Cal.App.2d 297, 70 Cal. Rptr. 223 (1969) (Defendant's reasons not stated).

(21) *People v. Moore*, 270 Cal.App.2d 486, 76 Cal. Rptr. 150 (1969) (Defendant felt that attorney failed to confer with him adequately).

(22) *People v. Hill*, 268 Cal.App.2d 504, 74 Cal.Rptr. 180 (1960) (Defendant expressed lack of confidence in public defender).

(23) *People v. Kranhouse*, 265 Cal.App.2d 440, 71 Cal. Rptr. 223 (1968) (Defendant's reasons not stated).

(24) *People v. Brown*, 253 Cal.App.2d 820, 61 Cal. Rptr. 368 (1967) (Defendant wanted to represent himself because he had been successful in the past).

(25) *People v. Norman*, 252 Cal.App.2d 381, 60 Cal. Rptr. 609 (1967) (Defendant expressed lack of confidence in public defender).

(26) *People v. Montigo*, 248 Cal.App.2d 32, 56 Cal. Rptr. 33 (1967) (Defendant's reasons not stated).

(27) *People v. Bourland*, 247 Cal.App.2d 76, 55 Cal.Rptr. 357 (1966) (Defendant wanted to represent himself because he said defense proposed by public

defender would result in perjury).

(28) *People v. Wozniak*, 235 Cal.App.2d 243, 45 Cal.Rptr. 222 (1965) (Defendant's reasons not stated).

(29) *People v. Collins*, 220 Cal.App.2d 563, 33 Cal.Rptr. 638 (1963) (Dissatisfaction with public defender).

(30) *People v. Justice*, 211 Cal.App.2d 660, 27 Cal.Rptr. 465 (1963) (Disagreement between defendant and counsel over trial strategy).

(31) *People v. Clark*, 176 Cal.App.2d 316, 1 Cal.Rptr. 176 (1959) (Defendant felt he could present defense more competently than appointed counsel).

(32) *People v. Williams*, 74 Cal.App.2d 364, 345 P.2d 47 (1959) (Defendant expressed lack of confidence in public defender).

(33) *People v. O'Ward*, 168 Cal.App.2d 127, 335 P.2d 762 (1959) (Defendant's reasons not stated).

(34) *People v. Mims*, 160 Cal.App.2d 589, 325 P.2d 234 (1958) (Dissatisfaction with public defender).

(35) *People v. Loignon*, 160 Cal.App.2d 412, 325 P.2d 541 (1958) (Defendant felt he could present defense more competently than appointed counsel).

(36) *People v. Mayers*, 144 Cal.App.2d 55, 300 P.2d 145 (1956) (Defendant's reasons not stated).

(37) *People v. Lamb*, 133 Cal.App.2d 179, 283 P.2d 727 (1955) (Defendant's reasons not stated).

(38) *People v. Collins*, 117 Cal.App.2d 175, 255 P.2d 59 (1953) (Dissatisfaction with public defender).

(39) *People v. Acorta*, 114 Cal.App.2d 1, 249 P.2d 316 (1952) (Defendant's reasons not stated).

(40) *People v. Mimms*, 110 Cal.App.2d 310, 242 P.2d 331 (1952) (Defendant's reasons not stated).

(41) *People v. Simon*, 107 Cal.App.2d 105, 236 P.2d 855 (1951) (Defendant's reasons not stated).

(42) *People v. McCabe*, 60 Cal.App.2d 492, 141 P.2d 54 (1943) (Defendant's reasons not stated).

(43) *People v. Schneider*, 3 Cal.App.2d 1, 39 P.2d 258 (1935) (Defendant's reasons not stated).

(44) *People v. Russell*, 139 Cal.App. 417, 34 P.2d 203 (1934) (Dissatisfaction with counsel).

CASES IN WHICH THE DEFENDANT WAS ALLOWED TO REPRESENT HIMSELF AND ENGAGED IN DISRUPTIVE CONDUCT

There were no reported cases in this category

CASES IN WHICH THE DEFENDANT SOUGHT BUT WAS DENIED BY THE TRIAL COURT LEAVE TO DEFEND PRO SE

(1) *People v. Rhinehart*, 9 Cal.3d 139, 107 Cal.Rptr. 34 (1973) (Defendant did not wish to be represented by public defender).

(2) *People v. Siegenthaler*, 7 Cal.3d 465, 103 Cal.Rptr. 243, 499 P.2d 499 (1972) (Defendant's reasons not stated).

(3) *People v. Sharp*, 7 Cal.3d 448, 103 Cal.Rptr. 233, 499 P.2d 489 (1972) (Defendant felt he could present defense more competently than appointed counsel).

(4) *People v. Noah*, 5 Cal.3d 469, 96 Cal.Rptr. 441, 487 P.2d 1009 (1971) (Defendant's reasons not stated).

(5) *People v. Floyd*, 1 Cal.3d 694, 83 Cal.Rptr. 608 (1970) (Defendant's reasons not stated).

(6) *People v. Daniels*, 71 Cal.2d 1119, 80 Cal. Rptr. 897 (1969) (Dissatisfaction with counsel).

(7) *People v. Darling*, 58 Cal.2d 15, 22 Cal.Rptr. 484 (1962) (Defendant's reasons not stated).

(8) *In re Cathey*, 55 Cal.2d 679, 12 Cal.Rptr. 762 (1961) (Defendant felt counsel had conflicting interests).

(9) *People v. Northcott*, 209 Cal. 639, 289 P. 634 (1930) (Defendant wanted to cross-examine adverse witnesses).

(10) *People v. Braun*, 29 Cal.App.3d 949, 106 Cal.Rptr. 56 (1973) (Dissatisfaction with counsel).

(11) *People v. Jacobs*, 27 Cal.App.3d 246. 103 Cal.Rptr. 536 (1972) (Dissatisfaction with public defender).

(12) *People v. Enciso*, 25 Cal.App.3d 49, 101 Cal.Rptr. 590 (1972) (Defendant's reasons not stated).

(13) *People v. Nabor*, 12 Cal.App.3d 380, 90 Cal.Rptr. 649 (1970) (Defendant felt he could present defense more competently than appointed counsel).

(14) *People v. Ochoa*, 9 Cal.App.3d 500, 88 Cal.Rptr. 399 (1970) (Dissatisfaction between defendant and counsel over trial strategy).

(15) People v. Weston, 9 Cal.App.3d 330, 87 Cal.Rptr. 922 (1970) (Dissatisfaction with public defender).

(16) *People v. Hagen*, 6 Cal.App.3d 35, 85 Cal.Rptr. 556 (1970) (Defendant's reasons not stated).

(17) *People v. King*, 276 Cal.App.2d 781, 81 Cal.Rptr. 336 (1969) (Defendant did not wish to be represented by public defender).

(18) *People v. Sullivan*, 271 Cal.App.2d 531, 77 Cal.Rptr. 25 (1969) (Defendant's reasons not stated).

(19) *People v. Conway*, 271 Cal.App.2d 15, 76 Cal. Rptr. 251 (1969) (Defendant's reasons not stated).

(20) *People v. Bonville*, 267 Cal.App.2d 4, 72 Cal.Rptr. 592 (1968) (Dissatisfaction with public defender).

(21) *People v. Ruiz*, 263 Cal.App.2d 216, 69 Cal.Rptr. 473 (1968) (Defendant did not wish to be represented by public defender).

(22) *People v. Johnson*, 258 Cal.App.2d 165, 65 Cal.Rptr. 441 (1968) (Defendant expressed lack of confidence in public defender).

(23) *People v. Powers*, 256 Cal.App.2d 904, 64 Cal.Rptr. 450 (1967) (Dissatisfaction with counsel).

(24) *People v. Addison*, 256 Cal.App.2d 18, 63 Cal.Rptr. 626 (1967) (Defendant's reasons not stated).

(25) *People v. Taylor*, 250 Cal.App.2d 367, 58 Cal.Rptr. 269 (1967) (Defendant's reasons not stated).

(26) *People v. Johnson*, 241 Cal.App.2d 423, 50 Cal.Rptr. 598 (1966) (Dissatisfaction with counsel).

(27) *People v. Shields*, 232 Cal.App.2d 716, 43 Cal.Rptr. 188 (1965) (Disagreement between defendant and counsel over trial strategy).

(28) *People v. Shroyer*, 203 Cal.App.2d 478, 21 Cal.Rptr. 460 (1962) (Dissatisfaction with public defender).

(29) *People v. Duncan*, 175 Cal.App.2d 372, 346 P.2d 521 (1959) (Defendant's reasons not stated).

(30) *People v. Marcus*, 133 Cal.App.2d 579, 284 P.2d 848 (1955) (Defendant contended fair trial impossible if represented by court-appointed counsel; defendant, who was charged with assault with deadly weapon in prison, wanted to show the "bestial treatment" to which he allegedly was subjected in prison).

(31) *People v. Kerr*, 113 Cal.App.2d 90, 247 P.2d 927 (1952) (Defendant's reasons not stated).

(32) *People v. Glenn*, 96 Cal.App.2d 859, 216 P.2d 457 (1950) (Defendant wanted to participate in jury selection).

APPENDIX B

Excerpt from *Hodge v. United States*, 414 F.2d 1040, 1048-49 n. E (9th Cir. 1969) (Ely, J., dissenting):

I imagine a colloquy which suggests the type of inquiry which would wholly eliminate the difficult problem which has met us here and, of more importance, would surely have not infringed fifth amendment rights. The imagined colloquy is as follows:

> THE COURT: Mr. Attorney, you tell me that the defendant chooses to waive counsel and represent himself because of the arising of "a difference of opinion this morning." I do not know the specific nature of the "difference of opinion." I know nothing of the defendant's competency or of his intelligence of understanding. The right to counsel is a crucial right. The Supreme Court has directed that no district judge, including me, may accept a defendant's waiver of counsel absent conviction that the waiver and the assertion of the correlative right of self-representation are knowingly and intelligently made. Under Von Moltke v. Gillies, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1947), I must, as far as practicable, satisfy myself reasonably that the defendant understands defenses which might be available to him, that he has been made aware of mitigating circumstances which might operate to his favor, that he apprehends the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, and other facts essential to a broad understanding of the whole matter. Either in your conference with the defendant this morning, or in any other conference, if you have had such, have you covered all of the matters which I have mentioned?

> MR. ATTORNEY: I would not like to represent to your Honor that I have covered all of those matters as specifically as would seem to be required by the opinion of Mr. Justice Black in Von Moltke and the opinion of the Court of Appeals of the Ninth Circuit in Sessions v. Wilson, 372 F.2d 366 (9th Cir. 1966). Would your Honor permit me to confer with the defendant for an additional thirty minutes?
>
> THE COURT: Certainly.
>
> (Thirty minute recess)
>
> THE COURT: Mr. Attorney, have you had a further conference with your client?
>
> MR. ATTORNEY: Yes, your Honor.
>
> THE COURT: Have you made the explanation I suggested covering the specific matters indicated?
>
> MR. ATTORNEY: Yes, sir.
>
> THE COURT: Did it appear that your client understood, insofar as it could be expected that a layman could do so, the explanations which you made?
>
> MR. ATTORNEY: Yes, your Honor.
>
> THE COURT: Very well. Mr. Defendant, you have heard the exchange of comments between the Court and the Attorney. Has the Attorney undertaken to make you aware of those factors which I have mentioned as being important to your case?
>
> THE DEFENDANT: Yes, your Honor, he has.
>
> THE COURT: Did you understand what he said?
>
> THE DEFENDANT: Yes, I did.
>
> THE COURT: Mr. Defendant, you have pleaded not guilty to the offense with which you are charged. The right to an attorney is a precious right, and it is the Court's view that you would be

far better able to defend yourself if you allowed the attorney, with which the Government has provided you, to proceed. I understand that you have a very limited education and that your only experience in court matters has been in connection with insignificant, comparatively petty offenses. I strongly suggest that you do not endeavor to represent yourself. Now, in view of all that has been said, what is your wish?

THE DEFENDANT: Your Honor, I still believe that I would like to act as my own attorney.

THE COURT: Very well, Mr. Defendant. You leave me no choice. You have the constitutional right to waive the assistance of an attorney and to represent yourself, provided that you exercise the right competently, knowingly, and intelligently. Upon the record, I make the finding that you do so. Mr. Attorney, you are relieved as active counsel, but, if the defendant has no objection, I ask that you stand by during the trial to offer the defendant such precedural guidance as he might request of you. In that connection, Mr. Attorney, there have been occasions when lawyers of the indigent panel have been rather lax in the performance of their duties. Too many cooks do not improve the soup, and I want you, yourself, to be present during the defendant's trial. You are the only attorney who is familiar with the details of the case. My purpose is to insure that justice is done, and the accomplishment of that object might be frustrated if you were not available and other attorneys, with no knowledge of the facts, would step in from time to time as substitutes. Is that clear?

MR. ATTORNEY: Yes, your Honor.

THE COURT: Very well, The trial will be scheduled for this coming March 23d at 9:30 a.m. I will not proceed with other matters.

Supreme Court, U. S.
FILED
SEP 16 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1973
No. 73-5772

ANTHONY PASQUALE FARETTA,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

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Adams v. United States ex rel. McCann, 317 U.S. 269 (1942) 32

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Lopez v. Pitchess, 265 Fed. Supp. 136 (C.D. Cal. 1967) 48
Manson v. Pitchess, 317 F. Supp. 816 (C.D. Cal. 1970) 48
Massey v. Moore, 304 U.S. 105 (1954) 50
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People v. Wells, 33 Cal. 2d 330, 202 P.2d 53 (1949) 50
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California Penal Code, Sec. 686 3

California Penal Code, Sec. 686.1 3

California Penal Code, Sec. 859 ..... 3, 4

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United States Code, Title 28, Sec. 1654 32

Judiciary Act of 1789, Chap. 20, 1 Stat. 73, Sec. 35 ..... 29, 30, 31

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7 William III (1696), Chap. 3, Sec. 1 ..... 22, 23

6 William IV (1836), Chap. 1148, Sec. 1 24

7 William IV (1836), Chap. 1148, Sec. 1 24

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Read, Lawyers at Line-ups: Constitutional Necessity or Avoidable Extravagance, 17 University of California at Los Angeles Law Review (1967) .. 49

Treatises

Beaney, W., The Right to Counsel in American Courts (1955) 24, 25, 26, 27

Blackstone, W., Commentaries 23, 24

Chitty, J., A Practical Treatise on the Criminal Law (1816) 22

Coke, E., Institutes, Chap. 2 [29] 19, 20

Friedman, L., A History of American Law (1973) 25

Halsbury's Law of England, 4th Ed. (1973) 25

Hamilton, A., The Federalist No. 84 (C. Rossiter, Ed. 1961) 28

Howell, T., State Trials (1816) 21

Kelly, B., A Short History of the English Bar (1908) 23

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Pollock, F., and F. Maitland, The History of English Law, 2d Ed. (1968) 18

Salmon, A New Abridgment and Critical Revision of the State Trials and Impeachments for High Treason (1738) 20, 21, 22

Schwartz, B., The Bill of Rights: A Documentary History (1971) 25, 26, 27, 28

Stephen, J., A History of the Criminal Law of England (1883) 19, 21, 24

IN THE

Supreme Court of the United States

October Term 1973
No. 73-5772

ANTHONY PASQUALL FARETTA,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

RESPONDENT'S BRIEF

Opinion Below

The opinion of the California Court of Appeal, Second Appellate District, Division Two, *People v. Faretta,* 2d Crim. 22722, was certified for nonpublication. A copy of this opinion is set forth in the Appendix. (App. pp. 25-30.) A copy of the Order of the California Supreme Court denying a Petition for Hearing is included in the Appendix. (App. p. 32.)

Jurisdiction

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3).

Question Presented

Does a defendant in a state criminal action have a federal constitutional right to represent himself without counsel at the trial proceedings?

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, *and to have the assistance of counsel for his defense.*" (Emphasis added.)

United States Constitution, Amendment XIV, section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Penal Code section 686 (in relevant part):

"In a criminal action the defendant is entitled:

. . .

"2. To be allowed counsel as in civil actions, or to appear and defend in person and with counsel, *except that* in a capital case he shall be represented in court by counsel at all stages of the preliminary and trial proceedings. . . ."

California Penal Code section 686.1:

"Notwithstanding any other provision of law, the defendant in a capital case shall be represented in court by counsel at all stages of the preliminary and trial proceedings."

California Penal Code section 859:

"When the defendant is charged with the commission of a public offense over which the superior court has original jurisdiction, by a written complaint subscribed under oath and on file in a court within the county in which the public offense is triable, he shall, without unnecessary delay, be taken before a magistrate of the court in which such complaint is on file. The magistrate shall immediately deliver to him a copy of the complaint, inform him that he has a right to have the assistance of counsel, ask him if he desires the assistance of counsel, and allow him reasonable time

to send for counsel. However, in a capital case, the court shall inform the defendant that he must be represented in court by counsel at all stages of the preliminary and trial proceedings and that such representation will be at his expense if he is able to employ counsel or at public expense if he is unable to employ counsel, inquire of him whether he is able to employ counsel and, if so, whether he desires to employ counsel of his choice or to have counsel assigned for him, and allow him a reasonable time to send for his chosen or assigned counsel. The magistrate must, upon the request of the defendant, require a peace officer to take a message to any counsel whom the defendant may name, in the judicial district in which the court is situated. The officer shall, without delay and without a fee, perform that duty. If the defendant desires and is unable to employ counsel, the court shall assign counsel to defend him; in a capital case, if the defendant is able to employ counsel and either refuses to employ counsel or appears without counsel after having had a reasonable time to employ counsel, the court shall assign counsel to defend him. If it appears that the defendant may be a minor, the magistrate shall ascertain whether such is the case, and if the magistrate concludes that it is probable that the defendant is a minor, he shall immediately either notify the parent or guardian of the minor, by telephone or messenger, of the arrest, or appoint counsel to represent the minor."

Penal Code section 987:

"(a) In a noncapital case, if the defendant appears for arraignment without counsel, he shall be informed by the court that it is his right to have counsel before being arraigned, and shall be asked if he desires the assistance of counsel. If he desires and is unable to employ counsel the court shall assign counsel to defend him.

"(b) In a capital case, if the defendant appears for arraignment without counsel, the court shall inform him that he must be represented by counsel at all stages of the preliminary and trial proceedings and that such representation will be at his expense if he is able to employ counsel or at public expense if he is unable to employ counsel, inquire of him whether he is able to employ counsel and, if so, whether he desires to employ counsel of his choice or to have counsel assigned to him, and allow him a reasonable time to send for his chosen or assigned counsel. If the defendant is unable to employ counsel, the court shall assign counsel to defend him. If the defendant is able to employ counsel and either refuses to employ counsel or appears without counsel after having had a reasonable time to employ counsel, the court shall assign counsel to him."

Statement of the Case

On June 21, 1972, the District Attorney of Los Angeles County filed an information in the Superior Court of the State of California for the County of Los Angeles charging petitioner with grand theft, a violation of section 487, subdivision 3, of the California Penal Code. (App. p. 1.) It was alleged that petitioner had four prior felony convictions. (App. pp. 2-3.)

The Los Angeles County Public Defender was appointed to represent petitioner. Petitioner pleaded not guilty. (App. p. 4.) On June 22, 1972, the petitioner filed with the court a document entitled "Petition To Proceed in Propria Persona." (Hereinafter referred to as pro. per.) Petitioner indicated to the court that he had previously represented himself, that he had negotiated a plea bargain in that case, and that he had a high school education. (App. pp. 34-35.)

When asked by the trial court why he thought he could do a better job of defending himself than someone with experience, petitioner answered:

> "THE DEFENDANT: Your Honor, I am very aware that the Public Defender's Office can give you equal representation, no doubt, but I also am considering the fact that the Public Defender's office is very loaded with its, you know, a heavy case load. And given the opportunity to research my case, I can devote all the time I am in custody, being that I can't post the bail as it stands now, to my case. And I feel that, you know, I can establish the proper defense." (App. p. 35.)

The trial court stated that it had been its experience that defendants who represented themselves became "bogged down in making motions" and "they completely neglect the problems of trying the lawsuit and winning it in a trial court." (App. pp. 35-36.) The trial court went on to say:

> ". . . . I have seen more people who represent themselves convict themselves, where if they just sat down and let somebody who knew what they were doing, do it, could well have won it." (App. p. 36.)

The trial court took the matter under submission and stated: "My inclination is to let you—I am telling you this—I think you are making a mistake. . . .

> "And second, when you come in here and you try this lawsuit, you are going to be treated like a lawyer. You aren't going to be treated like a layman. You are going to be treated like a lawyer. And if you don't know your way around, that's too bad." (App. p. 38.)

Subsequently, after petitioner again expressed his desire to represent himself and after the trial court cautioned him that he would have to abide by the rules as a lawyer, the trial court ruled as follows:

> "THE COURT: All right. The Court is going to make a preliminary ruling in this case to the following effect:
>
> "The Court finds that the defendant has demonstrated in the courtroom, both orally and in writing, a capacity to make an intelligent waiver of counsel;
>
> "The Court further finds that defendant understands that he is entitled to have a lawyer ap-

pointed to represent him and that he has made an intelligent waiver of that right.

"I therefore accept the defendant's waiver of his right to counsel and grant him the right to proceed in propria persona. The rights given to the defendant while incarcerated in the Los Angeles County Jail are those set forth in Superior Court Policy Memorandum in re: Pro Per Privileges.

"The Court, however, specifically reserves the right, as this matter proceeds to trial, to continually evaluate the capacity and the ability of this defendant to act as his own attorney, with the clear understanding that if at any time it becomes apparent to the Court that the defendant cannot act as his own attorney, his pro per status will be revoked and an attorney will be appointed to represent him." (App. p. 40.)

On July 13, 1972, the court made further inquiry of petitioner with respect to his ability to represent himself. The colloquy was as follows:

"THE COURT: In the Faretta matter, I brought you back down here to do some reconsideration as to whether or not you should continue to represent yourself.

"How have you been getting along on your research?

"THE DEFENDANT: Not bad, your Honor.

"Last night I put in the mail a 995 motion and it should be with the Clerk within the next day or two.

"THE COURT: Have you been preparing yourself for the intricacies of the trial of the matter?

"THE DEFENDANT: Well, your Honor, I was hoping that the case could possibly be disposed of on the 995.

"Mrs. Ayers informed me yesterday that it was the Court's policy to hear the pretrial motions at the time of trial. If possible, your Honor, I would like a date set as soon as the Court deems adequate after they receive the motion, sometime before trial.

"THE COURT: Let's see how you have been doing on your research.

"How many exceptions are there to the hearsay rule?

"THE DEFENDANT: Well, the hearsay rule would, I guess, be called the best evidence rule, your Honor. And there are several exceptions in case law, but in actual statutory law, I don't feel there is none.

"THE COURT: What are the challenges to the jury for cause?

"THE DEFENDANT: Well, there is twelve peremptory challenges.

"THE COURT: And how many for cause?

"THE DEFENDANT: Well, as many as the Court deems valid.

"THE COURT: And what are they? What are the grounds for challenging a juror for cause?

"THE DEFENDANT: Well, numerous grounds to challenge a witness—I mean, a juror, your Honor, one being the juror is perhaps suffered, was a victim of the same type of offense, might be prejudice toward the defendant. Any substantial ground that might make the juror prejudice toward the defendant.

"THE COURT: Anything else?

"THE DEFENDANT: Well, a relative perhaps of the victim.

"THE COURT: Have you taken a look at that code section to see what it is?

"THE DEFENDANT: Challenge a juror?

"THE COURT: Yes.

"THE DEFENDANT: Yes, your Honor. I have done—

"THE COURT: What is the code section?

"THE DEFENDANT: On voir diring a jury, your Honor?

"THE COURT: Yes.

"THE DEFENDANT: I am not aware of the section right offhand.

"THE COURT: What code is it in?

"THE DEFENDANT: Well, the research I have done on challenging would be in Witkins Jurisprudence.

"THE COURT: Have you looked at any of the codes to see where these various things are taken up?

"THE DEFENDANT: No, your Honor, I haven't.

"THE COURT: Have you looked in any of the California Codes with reference to trial procedure?

"THE DEFENDANT: Yes, your Honor.

"THE COURT: What codes?

"THE DEFENDANT: I have done extensive research in the Penal Code, your Honor, and the Civil Code.

"THE COURT: If you have done extensive research into it, then tell me about it.

"THE DEFENDANT: On empaneling a jury, your Honor?

"THE COURT: Yes.

"THE DEFENDANT: Well, the District Attorney and the defendant, defense counsel, has both the right to 12 peremptory challenges of a jury. These 12 challenges are undisputable. Any reason that the defense or prosecution should feel that a juror would be inadequate to try the case or to rule on a case, they may then discharge that juror.

"But if there is a valid challenge due to grounds of prejudice or some other grounds, that these aren't considered in the 12 peremptory challenges. There are numerous and the defendant, the defense and the prosecution both have the right to make any inquiry to the jury as to their feelings toward the case.

"THE COURT: The Court having observed the conduct and the demeanor of the defendant, in addition to what he said, does not believe that the defendant has made an intelligent and knowing waiver of his constitutional right to be represented by an attorney. Also taking into consideration the recent case of People versus Sharp, where the defendant apparently does not have a constitutional right to represent himself, the Court finds that the ends of justice and requirements of due process require that the prior order permitting the defendant to represent himself in pro per should be and is hereby revoked. That privilege is terminated.

"The Public Defender is appointed to represent the defendant in this case." (App. pp. 46-48.)

Petitioner then stated:

> "THE DEFENDANT: Your Honor, if I might again be heard on the matter. According to the Sixth Amendment, a defendant has the right to assistance of counsel of his choice, and I believe those are the words that are used, when I say 'assistance.'
>
> "Now, if the Court would find it appropriate that defendant act as co-counsel in this matter, I would then move that the Court would make that order." (App. p. 49.)

The court denied petitioner's motion to act as co-counsel. (App. p. 49.)

Subsequently, petitioner on two occasions requested the appointment of counsel other than the public defender, and these requests were denied. (App. pp. 54, 58-59.)

Petitioner denied the prior felony convictions. Trial was by jury. (App. pp. 10-12.) Petitioner was found guilty as charged, and the prior felony convictions were found to be true. (App. pp. 13-17.)

The trial court struck the prior felony convictions. Probation was denied, and petitioner was sentenced to the state prison for the term prescribed by law. (App. p. 21.)

Petitioner appealed from the judgment of conviction. (App. p. 23.) On June 26, 1973, the California Court of Appeal, Second Appellate District, Division Two, rendered an unpublished opinion affirming the guilt of petitioner as to one count of grand theft, a violation of section 487, subdivision 3, of the California Penal Code. (App. pp. 25-30.) The Court of Appeal held:

> ". . . Faretta had no constitutional right to represent himself. (People v. Sharp, 7 Cal. 3d 448, 459-460.) And we cannot say that the trial court abused its discretion in concluding that Faretta had not made a knowing and intelligent waiver of his right to be represented by counsel. (People v. Floyd, 1 Cal. 3d 694, 702-705.) Despite his desire to be his own attorney, Faretta did not appear aware of the possible consequences of waiving the opportunity for skilled and experienced representation at trial.
>
> "Smith v. Superior Court, 68 Cal.2d 547, relied on by Faretta, is not in point. Smith involved the right of the trial court to replace a court-appointed attorney based on the court's subjective belief that the attorney was not competent to handle the case. The defendant's understanding of the consequences of retaining the attorney was not in issue." (App. p. 27.)

On June 16, 1973, the California Court of Appeal denied a petition for rehearing. On August 22, 1973, the California Supreme Court denied a petition for hearing. Both of these actions were taken without opinions. (App. p. 32.)

On November 17, 1973, the motion to proceed *in forma pauperis* and the petition for writ of certiorari were filed. On March 18, 1974, this Court granted the motion for leave to proceed *in forma pauperis* and granted the writ of certiorari. (App. p. 65.)

Summary of Argument

A defendant has no federal constitutional right to represent himself at a criminal trial without counsel. History provides no precedent for a constitutional right of self-representation. No such right existed under the English common law or has been established under the Federal Constitution. Without historical basis, there is no foundation upon which to base any interpretation of the Sixth Amendment or the Due Process Clause of the Fourteenth as conferring a right to self-representation. Similar use of history was made by this Court in *Singer v. United States,* 380 U.S. 24, 26 (1965) in determining that the right to trial by jury did not create a federal right to waive jury.

The common law of England provides no basis for a right to self-representation. Instead of a right, self-representation was a tyrannical practice which prohibited counsel in felony proceedings. The Crown had forbade counsel in order to be able to weigh down the accused with his own ignorance, thus insuring convictions sought by the royal throne.

Nor may a constitutional right to self-representation be found in the American colonial charters or post-revolution state constitutions, since each of these documents varied on this point. Each individual colony or state either specifically mentioned or ignored self-representation. It was not left to implication.

The fact that self-representation is not of federal constitutional dimension is borne out by the enactment of the Judiciary Act of 1789. The Judiciary Act was debated by Congress at the same time as the Bill of Rights. The Judiciary Act set forth specifically both a right to counsel and a right to self-representation. The Bill of Rights established only a right to counsel. The

Framers of the Bill of Rights must have been aware of the federal statutory right to self-representation, but still refused to elevate such a procedure to a constitutional level.

The Sixth Amendment itself does not provide that an accused has the right to defend himself at criminal proceedings but, on the contrary, provides that an accused "shall have the assistance of counsel for his defense."

Self-representation at trial is not a "correlative right" of the right to assistance of counsel. This Court should follow the rationale of *Singer v. United States, supra,* 380 U.S. 24, 34-35 (1965), where it is stated:

> ". . . the ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right."

Thus, the fact that an accused has the ability to waive his right to counsel does not mean that he has the right to insist upon the opposite of that right, namely, the right to defend himself.

Due process of law does not require that a defendant be allowed to represent himself. The core of due process is to insure an accused a fair trial by affording him those rights which will best allow him to successfully defend against charges. By its decisions this Court has long held that the goal of a fair trial can only be achieved by affording an accused counsel at trial. *See Powell v. Alabama,* 287 U.S. 45 (1932); *Gideon v. Wainwright, supra,* 372 U.S. 335 (1963). Moreover, the government has a paramount obligation to see that the accused receives a fair trial, which is one where he is represented by counsel. Thus, due process requires that a defendant receive an objectively fair trial and not one dictated by his subjective whims.

Representation by counsel insures fair and efficient court procedures. Under the recent cases of *Illinois v. Allen*, 397 U.S. 337, 343 (1970) and *Taylor v. United States*, 414 U.S. 17, 20 (1973), a trial may continue without a defendant being present if he is unruly or he has fled in the course of the proceedings. The presence of counsel makes fair what otherwise could become an inquisitional proceeding if counsel were not present to protect the interests of the accused. Advisory counsel would be of no avail, since the degree of his involvement in the case would at best be uncertain and at worst an ordeal. In addition, criminal law includes very sophisticated defenses, so complex as to drown a layman in their intricacies.

If this Court holds that there is a constitutional right to represent oneself, then this right is a limited right. When a defendant who represents himself appeals his conviction, he cannot be allowed to argue his trial was unfair because he represented himself or raise issues concerning irregularities that occurred during trial as a result of the manner in which he represented himself. Moreover, an accused cannot be in a position where he can manipulate the proceedings so that if he is not acquitted at trial, he will gain a reversal on appeal.

Furthermore, if it is held that there is a constitutional right to self-representation, then the denial of that right is subject to the harmless error test of *Chapman v. California*, 386 U.S. 18, 23 (1967). Since a fair trial is achieved when one is represented by counsel, the denial of the right to self-representation is not the denial of a constitutional right which is basic to a fair trial. The accused should be entitled to relief only if he can show prejudice at trial from the denial of his request to represent himself.

ARGUMENT

I

UNDER THE FEDERAL CONSTITUTION THERE IS NO RIGHT TO SELF-REPRESENTATION IN CRIMINAL PROCEEDINGS

The Federal Constitution provides for no right to appear without counsel in a criminal trial. This proposition of law is borne out by both the Anglo-American historical experience and a proper analysis of the most fundamental propositions of legal analysis.

A. Historically There Was No Right to Self-Representation in Criminal Proceedings

There is no constitutional right to self-representation in criminal proceedings, as observed in both English common law and the history of our own nation. The use of history is peculiarly relevant to a determination of whether or not a right to self-representation exists. In *Singer v. United States, supra*, 380 U.S. 24, 26, 27 (1965) it was argued by the defendant that the right to jury trial also contained within it the negative "right to waive jury." This Court disposed of this allegation by means of historical analysis to show that such a right never existed. In the same manner, history shows that, other than by specific statute, specific colonial charter, or specific state constitution, a "right of self-representation" in criminal proceedings never existed and as such was never engrafted into the Federal Bill of Rights.

1. The English Common Law Experience

Under the common law of medieval and early modern England, self-representation in felony or treason cases was a tyrannical practice and never was a right

under the common law. Grano, *The Right to Counsel: Collcteral Issues Affecting Due Process,* 54 Minn. L. Rev. 1175, 1190-92 (1970) (hereinafter cited as Grano). Not only was self-representation in felony and treason matters a practice, but it was one of "tyrannical nature" since right to counsel was prohibited in those cases.

As this Court stated in *Holden v. Hardy,* 169 U.S. 366, 386 (1897):

> "Even before the adoption of the Constitution, much had been done towards mitigating the severity of the common law, particularly in the administration of its criminal branch. A number of capital crimes in this country at least had been largely decreased. Trial by ordeal or by battle had never existed here and had fallen into disuse in England. The earlier practice of the common law, which denied the benefit of witnesses to a person accused of felony, had been abolished by statute, though so far as it deprived him of the assistance of counsel and compulsory process for the attendance of his witnesses, it had not been changed in England. For the credit of the American colonies, let it be said that full press of the doctrine had never obtained a foothold there."

The story of the struggle for the right to counsel is in many ways the story of the rise of the legal profession in Anglo-American culture. "Before the end of the thirteenth century, there already exists a legal profession, a class of men who make money by representing litigants before the courts and giving legal advice." *See* F. Pollock and F. Maitland, *The History of English Law* 211 (2d ed. 1898).

Ironically, under the common law, a defendant had a right to counsel as to misdemeanors, but during the sixteenth and seventeenth centuries, he had no right to counsel in cases of treason and felony.[1] *I. J. Stephen, A History of the Criminal Law of England* 341 (1883) (hereinafter cited as *Stephen*).

The theory of trial and guilt was different under the common law than in the modern scheme of governmental practice. As Sir James Fitzjames Stephen, the noted nineteenth century legal scholar, has written:

> ". . . In nearly every one of the trials for the Popish Plot, and, indeed, in all the trials of that time, the sentiment continually displays itself, that the prisoner is half, or more than half, proved to be an enemy to the King, and that, in the struggle between the King and the suspected man, all advantages are to be secured to the King, whose safety is far more important to the public than the life of such a questionable person as the prisoner. A criminal trial in those days was not unlike a race between the King and the prisoner, in which the King had a long start and the prisoner was heavily weighted." *I. Stephen* at 397.

Lord Edward Coke in his *Institutes* discussed the reasons why, under the common law, a prisoner could

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[1]A defendant was required to have counsel in proceedings before the Star Chamber, the reason being, apparently, that defendants before that body

> ". . . were required to get their answers signed by counsel. The effect of this rule, and probably its object was, that no defence could be put before the Court which counsel would not take the responsibility of signing—a responsibility which, at that time, was extremely serious. If counsel would not sign the defendant's answer he was taken to have confessed the information." I *Stephen* at p. 341.

not have counsel in cases of treason or felony. He stated:

> ". . . First, that the testimonies and the proofs of the offence ought to be so clear and manifest, as there can be no defense of it. * Secondly, the court ought to be in stead of councell for the prisoner, to see that nothing be urged against him contrary to law and right; nay, any learned man that is present may inform the court for the benefit of the prisoner, of any thing that may make the proceedings erroneous." E. Coke, *III Institutes,* Chapter 2 [29].[2]

The absurdity of those two reasons for not giving counsel was fully shown in the notorious State Trials of that time. Rather these two excuses were used by the Crown to insure a conviction. By saying that ". . . the testimonies and the proofs of the offense ought to be so clear and manifest, as there can be no defense of it" is to declare a defendant's guilt before trial, a concept obnoxious to any assertion of a "right." Secondly, the fallacy of having the trial judge act as counsel for the defense is illustrated by two trials of the common law period.

In 1590, John Udall, a Puritan minister, was tried for publishing a book that attacked the established church. Udall requested the court:

> "My case is rare, and such as hath not been heard of heretofore, and consisteth upon divers points of law; I humbly crave of your lordship to grant me to answer by counsel, if it may be."

[2]It should be noted, however, that the right to counsel was afforded persons accused of treason or felony in Scotland. Salmon, *A New Abridgment and Critical Revision of the State Trials and Impeachments for High Treason,* at 336 (1738) (hereinafter cited as *Salmon*).

The court denied him counsel. Udall asked the court how many errors he was allowed by law to challenge. The court answered, "Nay, I am not to tell you that. I sit to judge, and not to give you counsel." T. Howell, *State Trials,* 1278 (1816) (hereinafter cited as *Howell*).

An even more notorious example was the trial of William Penn, the founder of Pennsylvania, and William Mead in 1670 arising out of the preaching of their faith. Testimony was taken to the effect that William Penn was preaching in the streets. The court recorder asked Mead: "What say you, Mr. Mead, were you there?" Mead answered:

> "It is a maxim in your own law, 'Nemo tenetur accusare seipsun,' which if it be not true Latin, I am sure it is true English, 'That no man is bound to accuse himself.' And why does thou offer to insnare me with such a question? Doth not this show thy malice? Is this like unto a judge, that ought to be counsel for the prisoner at the bar?" VI *Howell* at 958.

A practice did develop that, while a defendant in a treason or felony trial could not have counsel represent him, he could have counsel to advise him or argue points of law upon request to the court. I *Stephen,* at 424.

Thus, for example, in the trial of Archbishop Laud for high treason in 1643, the request that counsel might be allowed to argue points of law was granted. *Salmon,* at 211, 212. It can be seen that up to the period of the "Glorious Revolution" in 1688, there was no right to counsel in cases of treason and felony, even though counsel had been requested. After the "Glori-

ous Revolution," in which the Stuart line was driven forever from the throne of England, an act was passed allowing counsel in cases of trials for treason and misprison of treason. VII *William* III, ch. 3, § 1 (1696).

Thus, in 1696, counsel was to be allowed in the above-mentioned cases. The reason for this act was described by the early nineteenth century legal commentator, Joseph Chitty, as follows:

> ". . . In prosecutions for treason, it was feared that the very weight of the charge would tend to depress the prisoner, while from its political nature, it was too likely to be imputed, in bad times, to the innocent who might be obnoxious," I J. Chitty, *A Practical Treatise on the Criminal Law* 409 (1816).

The fact that counsel at trial was deemed to be so desired is best shown in the following circumstances. Robert Charnock, in 1695, was being tried for high treason shortly after the act permitting counsel in treason cases had been passed but before it was to come into effect.

> ". . . At their Arraignment, Mr. Charnock insisted on their having Counsel, and a Copy of their Indictment according to a late Act; and being told, that Act did not commence till Lady-Day, he observed, that the Preamble of that Act said, 'That this was reasonable;' and if it was so, it was as reasonable to Day as it would be a Fortnight hence. But this was over-ruled by the Court, and they were allowed neither." Salmon at 650.

Under the Stuarts, counsel was not allowed in cases of treason. Yet, because of the aforementioned

act under William III, Jacobite prisoners involved in the rebellions of 1716 and 1746 were able to have

> ". . . at least, trained advocates to plead their cause, and if the results were not in the majority of cases favourable to their hopes, the reason must be sought in the temper of the times and their own obvious share in the risings." B. Kelly, *A Short History of the English Bar*, 69 (1908) (hereinafter cited as *Kelly*).

The right to counsel in cases of high treason was of limited value to the typical criminal defendant. Such an offense was a comparatively rare occurrence, while charges of felony were multitudinous. *Kelly*, at 111-12. Thus, if any "right" was sought after in early England, it was representation by counsel.

Self-representation in felony trials was a practice forced upon defendants so as to insure the Crown a conviction of those who might possibly endanger the "Divine Right of Kings," which was the hallmark of the Stuart monarchy. It was as much a right as the rack, screw or branding iron was a right, since its effect was the same in protection of the Royal person against dissension in the Kingdom.

Thus, in the latter part of the eighteenth century at the time close to the birth of the American republic, counsel in England was allowed only in cases of misdemeanor and high treason. As Sir William Blackstone stated:

> ". . . But it is a settled rule at common law that no counsel shall be allowed a prisoner upon his trial, upon the general issue in any capital crime, unless some point of law shall arise proper to be debated. A rule which (however it may be palliat-

ed under cover of that noble declaration of the law, when rightly understood, that the judge shall be counsel for the prisoner; that is, shall see that the proceedings against him are legal and strictly regular) seems to be not at all of a piece with the rest of the humane treatment of prisoners by the English law. For upon what face of reason can that assistance be denied to save the life of a man which yet is allowed him in prosecutions for every petty trespass?" W. Blackstone, *4 Commentaries*,* 355-57.

In the middle of the eighteenth century, the practice arose allowing counsel to be more active in criminal cases. Sometimes counsel was allowed to do everything for the accused except address the jury. I *Stephen* at 424. It appears that such was merely an arbitrary practice depending on the whims of the trial judge. A request for counsel could be rejected. One accused was obliged to cross-examine witnesses without the aid of counsel and to examine for himself witnesses called to prove the defense of insanity which he had set up. I *Steven* at 424.

Thus, in the eighteenth century, it appears that the role of counsel in felony cases was very much limited or expanded depending on the particular idosyncrasies of the individual trial judge. W. Beaney, *The Right to Counsel in American Courts* 10 (1955) (hereinafter cited as *Beaney*).

The right to counsel in cases of felony did not become a part of the law of England until 1836, in the reign of William IV. 6 *and* 7 *William* IV, *ch.* 114, § 1 (1836). Thus, the right to counsel in England in felony cases was not established until quite late in English history and then it was conferred only as a statutory right.[8]

Therefore in light of the tyrannical practice in England of not allowing counsel first in treason and felony trials, and then in cases of felony, the right to counsel may be seen to have evolved as a reaction to the practice of enforced self-representation.

2. The Early American Experience

The American Colonial experience is rather unique. There was a somewhat inconsistent attitude in early Colonial America towards attorneys in that there were few of them and they were distrusted even if they were needed. "But as soon as a settled society posed problems for which the lawyers had an answer or at least a skill, the lawyers appeared in force and flourished in spite of animosity." L. Friedman, *A History of American Law*, 84 (1973).

The question of the extent to which counsel was allowed in colonial trials as opposed to the mother country is somewhat open. *Beaney* at 15.

Thus, in 1641, the Massachusetts Body of Liberties was enacted in section 26:

> "Every man that findeth himself unfit to plead his owne cause in any Court shall have Libertie to

[8]Even today the right to counsel in felony cases is one of statute. III *Halsbury's Laws of England*, 624, 625, 1141, 1142 (4th ed. 1973). It is true that a person charged with a criminal offense in England today cannot have counsel forced upon him against his will. *See Rex v. Woodward* (1944) K.B. 118. Unfortunately, the court in *Woodward* did not discuss the basis of their opinion in any detail. Furthermore, in light of the fact that the right to counsel in England is of statutory origin, it appears that *Rex v. Woodward, supra*, would be at most of limited precedential value.

> imploy any man against whom the Court doth not except, to help him, Provided he give him noe fee or reward for his paines. This shall not exempt the partie him selfe from Answering such Questions in person as the Court shall thinke meete to demand of him." I B. Schwartz, *The Bill of Rights: A Documentary History* at 74 (1971) (hereinafter cited as *Schwartz*).

The colonies and the revolutionary governments came up with all types of "hodgepodges," charters, declarations, and constitutions, sometimes giving a right to counsel and/or the "right" to self-representation as well as counsel. *See*, I *Schwartz*, 129 131, 170, 271, 276, 278, 282, 301, 316, 323, 338, 342, 371.

While some charters or state constitutions set forth self-representation as a right, others did not. In 1683 in the Pennsylvania Frame of Government, a defendant could personally plead his own cause or, if unable to, could use a friend.[4] In 1701, another provision was made to allow criminals to have the same privileges of witnesses and counsel as the prosecutors. *Beaney*, at 16.

In Delaware, the charter of 1701 gave "criminals" the same privileges of counsel as prosecutors. *Beaney*, at 17. In 1709, a statute was passed in Pennsylvania appointing counsel in cases involving capital offenses. *Beaney*, at 17. South Carolina in 1731, gave persons accused of treason, murder, felony and other capital offenses, the right to counsel. *Beaney*, at 17. Virginia permitted the accused in 1734 to have counsel in all

[4]Petitioner's assertion that those provisions in light of Penn's trial in England, implies a "right" of self-representation is a *non sequitur*. (Pet. Op. Br. pp. 34, 35.) The provision applies to civil cases as well as is therefore important only in light of the sparseness of attorneys in early colonial America.

capital cases upon request of the court, but it appeared that this was merely a restatement of the English practice permitting counsel to argue points of law. *Beaney*, at 17.[5]

Rhode Island in 1660 had enacted a provision which, in effect, had a similar result as Virginia. *Beaney*, at 17, 18. At the time of the American Revolution, when the colonies finally drove out the British, they also, in so doing, forced out many other restrictions of the common law.

It is interesting to note that at least four of the states—Pennsylvania, Vermont, Massachusetts, and New Hampshire—made provision for both counsel and self-representation. I *Schwartz* at 265, 323, 342, 377. If a state desired to create a right of self-representation, it specifically set one up in clear unequivocal language. This is important in light of the philosophic temper of the times, whether it be reflected in the writings of Thomas Paine or Alexander Hamilton. Examples of thought and philosophy of the purpose of a Bill of Rights in the days of the Birth of the Republic appear to declare that it was a specified series of rights granted by the sovereign power to the people.

The fact that at least four states had provisions allowing both right to counsel and self-representation clearly shows that there was no generally recognized right to self-representation. Thomas Paine, the great pamphleteer and patriot of eighteenth century America, had written a commentary in defense of the Penn-

[5]An earlier act, interestingly enough, had allowed slaveowners to make a full defense of slaves accused of a capital offense, causing the following comment, with justifiable cynicism, "Slaves were too valuable to be hanged without due deliberation.'" (Footnote omitted.) *Beaney*, 17.

sylvania Bill of Rights.[8] In this document Paine stated: "The Bill of Rights should be a plain positive declaration of the rights themselves." I *Schwartz* at 315.

Alexander Hamilton's view of a Bill of Rights was similar. In *The Federalist Papers*, Hamilton, while opposed to a Bill of Rights, defined one as follows: "It has been several times truly remarked that bills of rights are, in their origin, stipulations between kings and their subjects, abridgements of prerogative in favor of privilege, reservations of rights not surrendered to the prince." *The Federalist* No. 84 at 512-13. (C. Rossiter Ed. 1961.) The language of this Court in *Singer v. United States, supra,* 380 U.S. 24, 31, relating to the allegation of a "right" to waive jury not found in the Bill of Rights is applicable to the alleged "right" of self-representation in felony trials; "Indeed, if there had been recognition of such a right, it would be difficult to understand why . . . the Sixth Amendment were not drafted in terms which recognized an option."

The proponents and the authors of the Bill of Rights were both idealistic and pragmatic men who must have been familiar with the provisions of the state constitutions of Pennyslvania, Vermont, Massachusetss, and New Hampshire which provided for both right to coun-

[8]In Article 58 of the Georgia Constitution of 1777 it was stated:

> "No person shall be allowed to plead in the courts of law in this State, except those who are authorized so to do by the house of assembly; and if any person so authorized shall be found guilty of malpractice before the house of assembly, they shall have power to suspend them. This is not intended to exclude any person from that inherent privilege of every freeman, the liberty to plead his own case." I *Schwartz* at 299-300.

This provision, of course, applies only to civil cases as the right to counsel had not been extended to criminal cases in Georgia at that time. *Beaney* at 19.

sel and right to self-representation. In the Bill of Rights, provision was specifically made for right to counsel but not for self-representation. Section 35 of the Judiciary Act of 1789 provided:

> "*And be it further enacted*, that in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein." Judiciary Act of 1789, ch. 20, I Stat. 73, 92 (1789).

At the same time Congress was debating the Bill of Rights, they were debating the Judiciary Act in Congress, which made the "right" to representation merely statutory.

In *United States v. Plattner,* 330 F.2d 271, 274 (2d Cir. 1964), which found a "right" to self-representation, the Court of Appeals stated:

> "Section 35 of the Judiciary Act of 1789, I Stat. 73, 92 (1789), passed by the First Congress and signed by President Washington, one day before the same Congress proposed the Sixth Amendment provided 'That in all the courts of the United States the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein.'
>
> This statute gives more elaborate expression to the meaning of the terse language of the Bill of Rights which indicates, we think, that the constitutional rights to 'assistance of counsel" was intended to include the right of defendants in criminal cases 'to plead and manage their own causes personally.' "

However, such a conclusion is based upon flawed legal analysis while both the Sixth Amendment to the Federal Constitution and the Judicial Act of 1789 give a defendant a right to counsel, only the Judiciary Act of 1789 gives a defendant the right to self-representation. Thus, the framers of the Bill of Rights and those who debated its merits were familiar both with the language of the Sixth Amendment and the language in the Judiciary Act. Giving a defendant both a right to counsel and a right to self-representation in the Judiciary Act while giving only an express right to counsel in the Sixth Amendment, would indicate that the founding fathers intended that the right to counsel should be one of constitutional dimensions while the "right" to self-representation would be merely statutory. Thus, a defendant would have a constitutional and a statutory right to representation with counsel but only a statutory right as to self-representation. The framers in adopting the Bill of Rights, did so with their eyes open. They must have been familiar with the states which had constitutions giving a state "right" to self-representation and they must have been familiar with the Judiciary Act which they were debating at the same time as the Bill of Rights which also provided for self-representation. Yet, in spite of this awareness, the framers of the Bill of Rights specifically mentioned only the right to counsel. The omission of any mention of the right to self-representation must have been purposeful.

It is true that the debates in Congress as to both the Judiciary Act and the Bill of Rights are bereft of discussion on this point. Bearing the definition of Thomas Paine in mind that a Bill of Rights should be

a "plain, positive declaration of the rights themselves," along with the definition of Alexander Hamilton, there can be no other reasonable interpretation than that the framers purposely did not make self-representation a constitutional right.

Tracing the history of the right to counsel from its medieval common law origins, it is observed that self-representation in the common law of England was not a right but a practice to insure power remained in the Crown without meaningful dissent. In the colonial revolutionary experiences of America, while self-representation was made a state right in several states, the statutory federal right embodied in the Judiciary Act of 1789 is significantly absent from the Bill of Rights itself. It thus appears that the framers of the Bill of Rights probably had the medieval common law experience with all of its terrors in mind when they provided for a right to counsel but omitted any right to self-representation. From the English experience, the absence of counsel was not a right but rather the tool of despotic kings.

The expansion of the right to counsel within the trial process has been an important function of this Court, especially in this century. Landmark cases such as *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) and *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972), are symbols of this Court's policy to encourage and implement the right to counsel in the trial process and to insure that an orderly trial within the bounds of due process takes place. From the Middle Ages in England to the present United States, the lesson of history mandates full recognition of the right to counsel at trial but admits of no federal constitutional right of self-representation.

B. Self-Representation at a Criminal Trial Is Not a "Correlative Right" of the Right to Assistance of Counsel

The Federal Constitution expressly provides in the Sixth Amendment that an accused in a criminal prosecution "shall have the assistance of counsel for his defense," but does *not* expressly provide that he has the right to defend himself.[7] This Court has never ruled directly on the issue of the right to represent oneself in a criminal proceeding.

The argument that a defendant does have the right to defend himself in a criminal proceeding has been supported by the theory that the right to defend oneself is a "correlative right" of the right to assistance of counsel. The "correlative right" theory was expressed in dictum in this Court's decision in *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942). This theory is to the effect that an express right such as right to counsel also implies a right to appear without counsel.[8] The language in *Adams* was not essential to the holding of *Adams* that a defendant who has intelligently waived his right to counsel may also waive his right to jury trial.

In *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938), this Court held:

> ". . . The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel."

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[7]The right to defend oneself in federal courts is provided for by statute. 28 U.S.C. § 1654.

[8]Similar dictum is found in *Carter v. Illinois*, 329 U.S. 173, 174-75 (1946); *Moore v. Michigan*, 355 U.S. 155, 161 (1957); *see also Price v. Johnston*, 334 U.S. 266, 285 (1947).

But to state that a trial is valid where there is a knowing and intelligent waiver of counsel is quite different from saying that a defendant has a constitutional right to waive counsel and defend himself. This Court should follow the rationale in *Singer v. United States, supra*, 380 U.S. at 34-35, that "The ability to waive a constitutional right does not ordinarily carry with it the right to insist on the opposite of that right . . . ."

At issue in *Singer* was Rule 23(a) of the Federal Rules of Criminal Procedure which stated that an accused's waiver of jury trial was subject to the consent of the trial judge and the prosecutor. The petitioner argued that this rule was unconstitutional because in a federal criminal case an accused had not only a constitutional right to a jury trial but also a "correlative right" to have his case decided by the trial court if he considered such a trial to be to his advantage. This Court held that there was no federally recognized right to a trial before a judge sitting alone, but a defendant can in some instances waive his right to a trial by jury.

The Court then went on to hold in *Singer* that the waiver of jury could be conditioned upon the consent of the prosecuting attorney and trial judge because, again:

> "The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right. . . ." 380 U.S. at 34-35.

This reasoning should be applied to the issue before this Court. The fact that a defendant has the ability to waive his right to counsel does not mean that he has the right to insist upon the opposite of that right, namely, the right to defend himself.

Of note is the case of *Juelich v. United States,* 342 F.2d 29, 31-32 (5th Cir. 1965), where the issue was the right of a prisoner to dismiss court-appointed counsel on a motion to vacate sentence. The Fifth Circuit stated that there was no need to decide whether the right to defend *pro se* in a criminal prosecution was a constitutionally protected right because the Sixth Amendment did not apply. But the Court of Appeals pointed out that the Ninth Circuit in *Dillon v. United States,* 307 F.2d 445, 446-47 (9th Cir. 1962), stated that there could be a requirement of counsel under the Fifth Amendment. The Court in *Dillon* stated:

> "As this court has pointed out, the appointment of counsel may sometimes be mandatory even in those areas in which the Sixth Amendment does not apply. This is true when the circumstances of a defendant or the difficulties involved in presenting a particular matter are such that a fair and meaningful hearing cannot be had without the aid of counsel. Compliance with the due process clause of the Fifth Amendment then requires that counsel be appointed."

The Court in *Juelich* held:

> ". . . In such Fifth Amendment cases, it can hardly be argued that there is any 'correlative right to dispense with a lawyer's held' for that would imply the *reductio ad absurdum* that a hearing *not* 'fair and meaningful' is a constitutionally protected right. The courts have not yet gone that far." (Emphasis by the court.)

This reasoning should be equally applicable to proceedings where the right to counsel does apply. The Sixth Amendment provides that an accused shall have

the right to assistance of counsel so that he will receive a fair and meaningful trial. Thus, it can hardly be argued that there is a "correlative right" to dispense with the assistance of counsel because that would mean that a trial *not* fair and meaningful is a constitutionally protected right.

C. Due Process Does Not Require That a Defendant Be Allowed to Represent Himself

1. Due Process Requires That a Defendant Be Represented by Counsel to Insure That He Receives a Fair Trial

Petitioner argues that due process requires that he be allowed to defend himself, since he is entitled to present his defense as he sees fit and "according to his own rights." (Pet. Op. Br. pp. 40-53.) To the contrary, due process does not require that a defendant be allowed to represent himself. Indeed, the dictates of due process are best served when a defendant is represented by counsel.

In *Lisenba v. California,* 314 U.S. 219, 236 (1941) this Court defined due process of law in the criminal trial context as follows:

> ". . . denial of due process is the failure to observe that fundamental fairness essential to the concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial."

The concept of a fair trial was put in proper focus by the California Supreme Court in *People v. Sharp,*

7 Cal.3d 448, 460, 103 Cal.Rptr. 233, 240-41, 499 P.2d 489, 496-97 (1972), *cert. denied*, 410 U.S. 944 (1973), when it stated:

> ". . . The fairness of a trial is not to be predicated on any purported right of an accused to proceedings which are planned, directed or conducted by him, but rather on proceedings which will accord him the fullest opportunity to preserve all trial rights and successfully defend against charges."

Therefore, the core of due process is to insure an accused a fair trial by affording him those rights which will best allow him to successfully defend against charges.

By its decisions, this Court has long held that the goal of a fair trial can only be achieved by affording an accused counsel at trial. *See Powell v. Alabama*, 287 U.S. 45 (1932); *Gideon v. Wainwright*, 372 U.S. 335 (1963). The need for counsel at trial was cogently stated by Justice Sutherland:

> ". . . . Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether an indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be denial of a hearing, and, therefore, of due process in the constitutional sense." *Powell v. Alabama, supra*, 287 U.S. at 69.

Thus, the dictates of due process do not require that the accused have the right to defend himself at trial, but instead require that an accused receive a fair trial. This is achieved when an accused is represented at trial by counsel.[9]

Furthermore, this Court in *Singer v. United States, supra*, 380 U.S. at 36, stated that there is a governmental interest that its citizens receive a fair trial. This Court stated:

> ". . . The Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair trial result . . . ."

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[9]As was even stated by the Second Circuit in *United States v. Spencer*, 439 F.2d 1047, 1051 (2d Cir. 1971) (which has decided the leading federal cases holding that an accused has a right to defend himself):

> ". . . It seems to us that no matter how intelligent or educated a layman might be, he lacks the skill and knowledge to defend himself adequately."

This passage from the *Singer* opinion echoed the sentiment, also expressed in *Berger v. United States*, 295 U.S. 78, 88 (1934), that:

> ". . . the government attorney in a criminal prosecution is not an ordinary party to a controversy but a 'servant of the law' with a 'twofold aim . . . that guilt shall not escape or innocence suffer.'" 380 U.S. at 37.

Applying the governmental interest discussed in *Singer* to the issue now before this Court, the government has an interest in seeing that the trial is conducted in a manner which the Constitution regards as most likely to produce a fair trial result, and where the innocent does not suffer, namely, a trial where the defendant is represented by counsel. Thus, contrary to petitioner's assertion, the government as a litigant does have an interest in having a defendant represented by counsel because the government has a paramount obligation to see that the accused receives a fair trial. (Pet. Op. Br. p. 30.)

2. Due Process Requires That a Defendant Receive an Objectively Fair Trial and Not One Dictated by the Defendant's Subjective Whims

Petitioner argues that a defendant has the right "to go to jail under his own banner" (*United States ex rel. Maldanado v. Denno*, 348 F.2d 12, 15 (2d Cir. 1965), *cert. denied*, 384 U.S. 1007 (1966)). (Pet. Op. Br. pp. 43-45.) A commentator put this interest in perspective when he observed:

> "Nevertheless, it seems that there are government interests more important than the interest in protecting individual autonomy or in guaranteeing a trial that is subjectively fair. First, it should be remembered that Singer contended that a jury trial was not the most advantageous procedure for him, but the Supreme Court upheld the government's interest in utilizing the procedure deemed fairest by objective standards. Second, the government has interests that go beyond the accused. A strong and just government must supervise and restrict its own behavior to assure its continued strength and popular support, which depend, to some extent, on protecting the security of the rest of the members of the community. This security is maintained only if the community is convinced that the government will not deprive anyone of his rights except by methods objectively fair. Therefore, the government must have the right to demand that it not deviate from certain standards, even if the individual proceeded against would see no transgression." (Footnotes omitted.) *Grano* at 1196.

The idea that an accused should have the right to "go down under his own banner" sounds like a noble end, but viewed in the cold reality of concrete cases, it loses its appeal. This is true in most cases since an attorney will better defend an indigent than such a defendant will defend himself. (*Cf. Powell v. Alabama, supra.*) It is especially true in those cases where the penalty is severe. This problem is pointed up by the struggle that the Supreme Court of New Jersey had with the issue in *State v. Davis*, 45 N.J. 195, 212 A. 2d 19, 21 (1965). There the court stated:

> ". . . . Now defendant complains that the trial court denied him his constitutional right to con-

duct his own defense. It is frequently said an accused has that right [citations omitted], but that right is not absolute. A man may defend himself if he can with fairness to the State and to the judicial process. Further, in capital cases, we have a policy against the imposition of a death sentence upon a plea of guilty, and upon that same policy would not permit a man at trial to default deliberately to that end. There is no indication that defendant is thus motivated; we mention the subject only because it is a factor which a trial court may have to weigh. Necessarily, there must be a considerable area of discretion in a trial court and its decision should not be rejected unless it was plainly improvident.

". . . . We do not disagree with the trial court's treatment of this problem albeit there ensued difficulties, of defendant's own making. But in the light of that experience with this defendant, we suggest the retrial be handled differently. Counsel should again be assigned. By now defendant must be fully aware of the difficulties of defending himself, and the hazards involved. If after consultation with counsel he informs the trial judge in open court that he does not wish the aid of counsel, he should, upon appropriate warning of the consequences of his choice, be permitted to conduct his own defense, with assigned counsel available at all times in the courtroom to advise or aid defendant as defendant may wish. *The trial court of course will remain free to depart from our suggestion as circumstances may indicate.*" (Emphasis added.)

An accused may ignorantly believe that he is better able to prepare and present his defense but tragically discover when the proceedings have concluded that he unwittingly deceived himself.

Petitioner seeks to define due process as the opportunity of a defendant in a criminal proceeding "to shape and present his defense according to his own lights." (Pet. Op. Br. p. 40.) It is urged again that, to the contrary, the guarantees of due process are to afford a defendant an objectively fair trial where only admissible evidence and legal defenses are presented. The constitutional rights enumerated by petitioner—the right to be present at all pertinent stages of the criminal trial; the right to present evidence; the right to take the stand in his own behalf; and the right to compulsory process for witnesses in his favor—all serve to guarantee a fair result and to do justice, and not to satisfy a defendant's subjective wish that the trial be conducted according to his whims. (Pet. Op. Br. p. 41.)

Petitioner argues that the right of an accused to present a defense as he sees fit is implicit in the Sixth Amendment clauses concerning confrontation and compulsory process.[10] Petitioner argues that the right to be present is derived from the confrontation and compulsory process clauses, and thus it is implicit in that right to be present that a defendant has the right to present his defense as he sees fit. (Pet. Op. Br. pp. 41-42.)

The rights enumerated in the Sixth Amendment, such as the right to confrontation and the right of com-

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[10]The Sixth Amendment provides that "the accused" has the right "to be confronted with witnesses against him" and has the right "to have compulsory process for obtaining witnesses in his favor."

pulsory process, are specific rights deemed necessary in order to afford an accused a fair trial and to give him the ability to defend against the charges against him. *Cf. Pointer v. Texas,* 380 U.S. 400, 404 (1964). These goals are fulfilled when a defendant is present at trial with counsel and is afforded the opportunity to cross-examine witnesses and has the ability to call witnesses to support his defense.

No right of an accused to present his defense as he sees fit is implicit in the right to be present at pertinent stages of a criminal trial.[11] The right to be present derives from the Confrontation Clause.[12] The goals of the right to confrontation are fulfilled when a defendant is able to see his accusers face-to-face, and is given the opportunity to cross-examine them. *Mattox v. United States,* 156 U.S. 237, 242-43 (1895); *Pointer v. Texas, supra,* 380 U.S. at 404. These goals are further satisfied when the accused has the opportunity to communicate with his counsel to make suggestions. *Cf. Illinois v. Allen, supra,* 397 U.S. at 344.

Petitioner points out that this Court, when discussing an accused's right to be present at trial, in *Snyder*

[11]By his actions a defendant can waive his right to be present at trial and the trial can be conducted in his absence. *Illinois v. Allen,* 397 U.S. 337 (1970); *Taylor v. United States,* 414 U.S. 17, 19-20 (1973).

[12]This Court has held that the right to be present is derived from the Confrontation Clause of the Sixth Amendment. *Illinois v. Allen, supra,* 397 U.S. 337 (1970); *Lewis v. United States,* 146 U.S. 370 (1892). This Court has also held that the right to be present at trial is a fundamental aspect of due process of law. *See Hopt v. Utah,* 110 U.S. 574 (1884); *Schwab v. Berggren,* 143 U.S. 442 (1892); *Dowdell v. United States,* 221 U.S. 325 (1911); *Snyder v. Massachusetts,* 291 U.S. 97 (1934). Respondent has not found any cases and petitioner has not cited any cases that indicate that the right of the accused to be present at pertinent stages of a criminal trial is derived from the compulsory process clause. (*See* Pet. Op. Br. p. 42.)

v. Massachusetts, 291 U.S. 97, 106 (1934), observed in passing:

> ". . . Again, defense may be made easier if the accused is permitted to be present at the examination of jurors or the summing up of counsel, for it will be in his power, if present, to give advice or suggestions or even to supersede his lawyers altogether and conduct the trial himself." (Pet. Op. Br. p. 42.)

In making this observation, the Court in *Snyder* was in no way dealing with the issue of a possible right of self-representation, but was deciding whether a defendant has the right to be present when a jury views the scene of the crime. This passage should not be read as suggesting that the right to be present means that there is a constitutional right to defend oneself. Clearly the Court did not so hold. On the contrary, the Court appears to have been considering possibilities as to what might occur or what an accused might do if he was present at trial.

The discussion in *Snyder* concerning the right to be present was grounded on the idea that "the right to be present is a condition of due process to the extent that a fair and just hearing will be thwarted by his absence . . . ." 397 U.S. at 107-08. As has been discussed previously, due process requires a fair trial and does not require that a defendant be allowed to conduct his own defense.

Petitioner points out that when a defendant is represented by counsel in the California courts, counsel has the authority to make a number of binding decisions.[13]

[13]In *People v. Robles,* 2 Cal.3d 205, 215, 85 Cal.Rptr. 166, 172, 466 P.2d 710, 716 (1970), the California Supreme Court

(This footnote is continued on next page)

(Pet. Op. Br. pp. 18-21.) The general nature of these decisions require that they be made by someone with legal knowledge and experience beyond that normally possessed by the layman accused of crime. Again, the layman's need for counsel at trial was expressed by Justice Sutherland:

> ". . . . Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect." *Powell v. Alabama, supra,* 287 U.S. at 69.

held that although an attorney representing a criminal defendant has the power to control the court proceedings, "that power may not be exercised to deprive a defendant of certain fundamental rights." *Robles* held that a defendant has the right to testify in his own defense over the objection of his counsel. Additionally, under California law, a defendant must expressly waive his right to a jury trial (Cal. Const., art. I § 7; *People v. Holmes,* 54 Cal.2d 442, 444, 5 Cal.Rptr. 871, 872, 353 P.2d 583, 584 (1960)), and must personally waive certain constitutional rights when pleading guilty (*In re Tahl,* 1 Cal.3d 122, 132-33, 81 Cal. Rptr. 577, 584-85, 460 P.2d 449, 456-57 (1969), *cert. denied,* 398 U.S. 911 (1970)).

The decisions cited by petitioner which put counsel in charge of the management of the defense really illustrate respondent's point that the courts seek to provide an accused with a fair trial where he will be able to defend against the charges and not with a trial that defendant can exclusively plan and direct. These decisions would seem to contradict petitioner's assertion that the core of due process is to allow a defendant to shape his own defense. (*See* Pet. Op. Br. p. 40.)

Petitioner additionally points out that an indigent has no right to select counsel of his choice. (Pet. Op. Br. pp. 21-23.) This point would appear to be in conjunction with the argument that a defendant need be able to communicate and have confidence in his attorney. (Pet. Op. Br. p. 44.) But a defendant may be a sociopath who could get along with no one. Furthermore, the accused could suffer from mental deficiency or insanity or other types of illnesses of the mind that would make it impossible for him to have any significant rapport with any specific attorney. A trial is not a "popularity contest" to be won by smiles and handshakes, but rather serious business to be decided by the best technical minds available. In reality, if an indigent accused facing trial were allowed to select an attorney, he would have great difficulty determining whether he would be able to communicate with and have confidence in a particular attorney. Furthermore, if counsel is appointed, and if later the accused decides that he wants another attorney appointed, the courts are generally reluctant to interrupt proceedings to allow for a new appointment. *Cf. United States v. Grow,* 394 F.2d 182, 209 (4th Cir. 1968); *cert. denied,* 393 U.S. 840 (1968); *Arellanes v. United States,* 326 F.2d 560, 561 (4th Cir. 1964); *People v. Williams,* 2 Cal.3d 894, 904-

05, 88 Cal.Rptr. 208, 214-15, 471 P.2d 1008, 1014-15 (1970), *cert. denied*, 401 U.S. 919 (1971).

Thus, the conclusion must be reached that due process does not require that a defendant be allowed to represent himself. The concept of due process is to insure that a defendant receives a fair trial and the developing law has been to insure him counsel so as to achieve that end. This Court in *Singer v. United States, supra*, 380 U.S. at 36 (1965), stated:

> "We find no constitutional impediment to conditioning a waiver of this right [trial by jury] on the consent of the prosecuting attorney and the trial jury when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury—the very thing that the Constitution guarantees him."

Applying the *Singer* rationale to the issue as to whether a defendant has a right to represent himself, if a defendant is not allowed to represent himself, the result is simply what the Constitution guarantees him—a trial where he is represented by counsel.

D. A Policy of Representation by Counsel Insures Fair and Efficient Court Procedure

Petitioner further argues that there are no considerations of judicial administration that would warrant nonrecognition of the "right of self-representation." (Pet. Op. Br. p. 58.) Rather, the desire for an orderly and fair trial would instead negate self-representation as being a constitutional right. In the recent case of *Illinois v. Allen, supra*, 397 U.S. 337, 343 (1970), this Court held that an unruly defendant could be removed from court in the course of his trial because of misconduct. As Justice Black wrote for this Court in the *Allen* case:

> ". . . . It is essential that in the proper administration of criminal justice that dignity, order and decorum be the hallmarks of all court proceedings in our country." *Id.*

Dignity, order and decorum are most important if both the defense and the prosecution are to receive a fair trial. This Court made clear in *Illinois v. Allen, supra*, 397 U.S. 337, 346, 347, "But, if our courts are to remain what the Founders intended, the citadels of justice, these proceedings cannot and must not be infected with the sort of scurrilous, abusive language and conduct paraded before the Illinois trial judge in this case." To allow an untrained layman to have a "right" to self-representation would defeat the purpose of a fair trial whether done intentionally or nonintentionally by the accused.

In *Mayberry v. Pennsylvania*, 400 U.S. 455, 462 (1970), this Court stated: "Laymen foolishly trying to defend themselves may understandably create awkward and embarrassing scenes." Yet if a defendant who represents himself is unruly and must be forced from the courtroom and is not represented by counsel, there is no party to represent him in the trial court. For example, in the recent case of *Taylor v. United States, supra*, 414 U.S. 17, 20 (1973), this Court held that a trial may continue even if a defendant who is being tried has fled in the course of his trial and is not present at the proceedings. To allow a defendant a right to self-representation would be to place the court in a true predicament because if the defendant is unruly or flees the jurisdiction of the court, the trial may continue

and would, quite unintentionally, have the same effect as an inquisitorial hearing without the benefit of any defense whatsoever.

Petitioner argues, however, that the trial judge, by advice and suggestion, should assist the defendant. (Pet. Op. Br. p. 55.) However, as observed in the preceding discussion of history of the common law, this line of argument was the excuse which prevented counsel from being appointed in felony cases for centuries in England. While, no doubt, a trial judge would try to be fair to both sides, he first of all should be an impartial referee and cannot, by his very nature, assume the role of an advocate in order to provide a proper defense.

Petitioner next suggests that advisory counsel should be appointed to assist the defendant as to his needs and wants. (Pet. Op. Br. pp. 55, 56.) In California, a defendant has no right to advisory counsel if he chooses to defend himself *in propria persona*. *See People v. Mattson*, 51 Cal.2d 777, 789, 336 P.2d 937, 946 (1959); *Ligda v. Superior Court*, 5 Cal.App.3d 811, 820, 85 Cal.Rptr. 744, 749 (1970); *People v. Adame*, 169 Cal.App.2d 587, 601, 337 P.2d 477, 487 (1959), *cert. denied*, 361 U.S. 969 (1960). No such requirement appears to exist in the federal courts. *See Lee v. State of Alabama*, 406 F.2d 466, 469 (5th Cir. 1968), *cert. denied*, 395 U.S. 927 (1969); *Duke v. United States*, 255 F.2d 721, 725 n. 7 (9th Cir. 1958), *cert. denied*, 357 U.S. 920 (1958); *Manson v. Pitchess*, 317 F.Supp. 816, 824 (C.D. Cal. 1970); *Lopez v. Pitchess*, 256 F.2d 136, 142 (C.D. Cal. 1967).

To make "advisory counsel" a "right" would truly confuse the issue as the question would be raised time

and again to what extent his counsel's role in the trial was purely advisory and how "advisory" is to be defined. Furthermore, a question would be raised as to what extent the "advisory counsel" could take a more aggressive role in the trial if a defendant became either unruly or fled in the course of the trial. The ramifications of "advisory counsel" would be so manifold as to cause untold confusion, and it would be merely another obstacle in the path of justice which is already far overclogged with court calendars. *Cf.* Read, *Lawyers at Lineups: Constitutional Necessity or Avoidable Extravagance?*, 17 U.C.L.A. L. Rev. 339, 393, 394 (1967).

Another problem is also raised by giving a defendant a right to represent himself. A defendant may be insane or at the most mentally deficient and, thus, not be properly qualified to represent himself even though he may have sufficient presence of mind to waive counsel. Some defendants are narcotics addicts who may be going through mental or physical withdrawal as a result of not being given their drug dosage. To provide for a right of self-representation in such cases would defeat the whole purpose of a fair trial since they could not properly judge in an objective manner what might be a proper defense. For example, California has a very sophisticated defense known as diminished capacity. Diminished capacity is a defense relating to reduced culpability from mental states because of mental illness, mental defect or mental disease or intoxication. If a defendant cannot attain a certain state of mind required to commit a crime or a certain degree of that crime, he cannot be found guilty of that crime or that degree. *People v. Conley*, 64 Cal.2d 310, 44 Cal. Rptr. 815, 411 P.2d 911 (1966); *People v. Gor-*

shen, 51 Cal.2d 716, 336 P.2d 492 (1959); *People v. Wells*, 33 Cal.3d 330, 202 P.2d 53 (1949); *cert denied*, 388 U.S. 836 (1949).

It would be impossible for a defendant to set up a proper defense based upon mental deficiency, whether insanity or diminished capacity, because of (a) the necessity for examination of expert witnesses; (b) a deep understanding of the complex legal standards for these defenses; and (c) an objective acceptance of the applicability of these defenses.

Moreover, in certain cases, if a defendant's lack of skill or his ignorance is extreme and the case is very complex, then a fair trial demands that he be represented by counsel. *Cf. McNeal v. Culver*, 365 U.S. 109, 114 (1961). The court in *Massey v. Moore*, 348 U.S. 105, 108 (1954), stated:

> ". . . . We have not allowed convictions to stand if the accused stood trial without benefit of counsel and yet so unskilled, so ignorant, or so mentally deficient as not to be able to comprehend the legal issues involved in the case."

Mental defenses are not the only technical principles a defendant might have to master. Defense of "so-called white collar crimes" mandates a knowledge of specific elements. Proper forms and motions for exclusion of alleged tainted evidence and statements must be thoroughly understood. Criminal law is a complex area, becoming more complex as time passes, with rapid changes of legal standards in this field. A layman could only be crushed by the torrent of complexity and intricacy that so encompasses criminal law.

Petitioner also argues that the quality of various attorneys and the caseload of the public defender's office might inhibit his gaining as good representation as is possible and therefore, a defendant should be able to represent himself if he so chooses. (Pet. Op. Br. pp. 52, 53.) Fortunately or unfortunately, the legal profession is the same as any other profession and its practitioners' skill and knowledge vary as widely or narrowly as any other profession or vocation. However, it can be presumed that even the most minimal representation by a member of the Bar would be preferable to that of a layman attempting to find his way in the complexity of the law.

In addition, there are safeguards as to the quality of representation of counsel by reason of appellate review of effectiveness of a trial attorney on appeal. However, petitioner argues that the standard in California is not adequate since for a defense attorney to be incompetent, misrepresentation must have been such as to reduce the trial to a farce and a sham. *People v. Ibarra*, 60 Cal.2d 460, 464, 34 Cal.Rptr. 863, 866, 386 P.2d 487, 490 (1963). (Pet. Op. Br. p. 23.) Unfortunately, most laymen defending themselves would by the very nature of their ignorance and the tenseness of the situation force the trial into a farce and a sham. Appellate rules of incompetence of counsel at least keep representation within certain bounds. Thus, with these safeguards in mind, the quality of representation is never allowed to become so deficient as to mandate a conclusion that an accused should have an absolute right to appear without counsel. *Grano* at 1175, 1198.

II.

EVEN IF THERE WERE A CONSTITUTIONAL RIGHT TO SELF-REPRESENTATION, IT IS A LIMITED RIGHT AND THE FOLLOWING STANDARDS SHOULD APPLY

A. A Defendant Who Represented Himself at Trial Should Not Be Allowed to Raise the Issue of the Quality of That Representation on Appeal

Petitioner concedes that the defendant who represents himself "will not be heard to complain of the quality of his own performance." (Pet. Op. Br. p. 55.) The case law supports this concession. Courts that have held that an accused has a right to defend himself have also held, when appealing a conviction or seeking collateral relief, the defendant cannot argue that his trial was unfair because he represented himself or raise issues concerning irregularities that occurred during trial as a result of the manner in which he represented himself. *See Smith v. United States*, 216 F.2d 724, 727 (5th Cir. 1954). As was stated by the Supreme Court of Minnesota in *State v. Huber*, 275 Minn. 475, 148 N.W.2d 137, 142 (1967):

> ". . . . Where [an accused] elects to [conduct own defense] . . . with full knowledge and understanding of the risk involved, he should not expect to have a new trial because of irregularities which grew out of the manner in which he decided to conduct his defense."

It would be unconscionable to permit a defendant to represent himself knowing that if he blunders he can always have a new trial because of his incompetency.

This issue was discussed by the court in *United States v. Redfield*, 197 F.Supp. 559, 575 (D. Nev. 1961), where it stated:

> "Defendant has hit on quite a scheme: waive counsel, take your chances with the jury, then if the jury disappoints you, merely point out that you had a poor substitute for a lawyer, thereby gaining another trial with the concomitant chance that you will find one juror who will keep you from paying the penalty which the law exacts . . . . Some court other than this one will have to sanction such a subterfuge."

An accused cannot be in a position where he can manipulate the proceedings so that if he is not acquitted at trial, he will gain a reversal on appeal. Thus, a defendant who chooses to represent himself at trial should not be allowed on appeal to raise the issue of the quality of his own representation.

Furthermore, the trial court faces a dilemma if a defendant seeks to represent himself because it needs to determine whether the defendant made an "intelligent and understanding" waiver of the right to counsel. *Johnson v. Zerbst, supra*, 304 U.S. at 464.

Cunning defendants will take advantage of this dilemma and the demand for self-representation becomes a "heads I win tails you lose" proposition. If a trial court too readily grants the demand for self-representation an appellate court may find the waiver of counsel to be ineffectual. On the other hand, if the trial court seeks to protect the defendant's right to counsel, the

appellate court may find that he was denied his right to represent himself.

This dilemma supports the proposition that a defendant should not be afforded the right to represent himself. If it is held that a defendant does have such a right, then this Court should severely limit an accused's right to raise on appeal the issue of the trial court's decision granting his demand to represent himself.

B. The Denial of Self-Representation Is Subject to the Harmless Error Test

Petitioner in his brief points out that the California Supreme Court in *People v. Sharp, supra,* 7 Cal.3d 448, 104 Cal.Rptr. 233, 499 P.2d 489 (1972), held that the Federal and California Constitutions do not guarantee the right of self-representation. (Pet. Op. Br. p. 29.) But the California Supreme Court did not hold that a defendant may never represent himself. The court indicated that an accused would be allowed to represent himself in a proper case, and the guidelines to be followed were those set forth in *People v. Floyd,* 1 Cal.3d 694, 702-03, 83 Cal.Rptr. 608, 703, 464 P. 2d 64, 68 (1970), *cert. denied,* 406 U.S. 972 (1972), where it was stated:

> ". . . . 'the defendant's right to represent himself cannot be denied simply because he is unable to demonstrate either the acumen or the learning of a skilled lawyer.' [Citations.] A defendant may waive counsel and choose to represent himself only if the defendant has an intelligent conception of the consequences of his act [citations] and understands the nature of the offense, the available pleas and defenses, and the possible punishments. [Citations.]"

The court in *Sharp* went on to state that when reviewing a trial court's discretion in denying a motion to defend *in pro. per.,* any error would not be regarded as one of constitutional dimension. If there was error, the test to be applied was whether, on review of the entire record, it was reasonably possible that a result more favorable to defendant would have reached had he represented himself. *Cf. People v. Watson,* 46 Cal.2d 818, 837, 299 P.2d 243, 254-55 (1956), *cert. denied,* 350 U.S. 846 (1957).

If this court should hold that there is a constitutional right of self-representation, then the denial of that right should be subject to the harmless error test. This Court in *Chapman v. California,* 386 U.S. 18, 23 (1967), stated that some constitutional rights are "so basic to a fair trial that their infraction can never be treated as harmless error . . . ." The Court indicated that examples of such rights were the prohibition against the use of a coerced confession, the right to counsel, and the right to an impartial judge. *Chapman v. California, supra,* 386 U.S. at 23 n. 8.

The denial of the right of self-representation should be subject to the harmless error test because it is not a right "basic to a fair trial." As was argued previously, a fair trial is achieved when one is represented by counsel. Thus, the nature of the interests a defendant loses if he is denied the right to defend himself, such as the right to control the presentation of his defense, are such that their denial does not render a trial fundamentally unfair.

Moreover, even the Second Circuit, which has decided some of the leading cases holding that there is a right to self-representation, has held that the denial of the right to defend oneself is not reversible error where

no prejudice is shown. *United States v. Albamonte*, 348 F.2d 700, 704 (2d Cir. 1965).

Furthermore, the Second Circuit does not treat the "right" of self-representation the same as it does the right to assistance of counsel. Under Second Circuit cases, it is not constitutionally required that a defendant be advised of this "right" of self-representation. *United States v. Plattner, supra*, 330 F.2d at 276. Regardless of whether he has been advised of this right, the defendant must make an unequivocal request to act as his own lawyer in order to invoke the right. *United States ex rel. Maldonado v. Denno, supra*, 348 F.2d at 15.

Additionally, once the trial has begun, the defendant no longer possesses the absolute right to defend himself. A balancing test is then employed:

> ". . . . Once the trial has begun with the defendant represented by counsel, however, his right thereafter to discharge his lawyer and to represent himself is sharply curtailed. There must be a showing that the prejudice to the legitimate interests of the defendant overbalances the potential disruption of proceedings already in progress, with considerable weight being given to the trial judge's assessment of this balance." *United States ex rel. Maldonado v. Denno, supra*, 348 F.2d at 15. *See Dearinger v. United States*, 344 F.2d 309, 311 (9th Cir. 1965); *United States v. Private Brands*, 250 F.2d 554 (2d Cir. 1957); *United States v. Mitchell*, 137 F.2d 1006 (2d Cir. 1943).

Therefore, the right of self-representation is not one of those rights "so basic to a fair trial that their infraction cannot be treated as harmless." Thus, the denial of that right is subject to the *Chapman* harmless error test.

Conclusion

For the foregoing reasons, respondent submits that under the Federal Constitution an accused has no right to represent himself at trial. No such alleged constitutional right can be found in the annals of Anglo-American jurisprudence. Furthermore, the express absence of such a "right" in the Bill of Rights implies that it was purposely omitted and could not be a correlative right to "assistance of counsel." Due process, rather than recognizing a right of self-representation, favors counsel, to insure a fair trial. For there to be due process, a defendant must receive an objectively fair trial and not simply "be allowed to go to jail under his own banner," irrespective of whether he presents a competent defense. Fair and efficient court proceedings which protect both the rights of the People and the accused support a policy of representation by counsel. As such the judgment should be affirmed.

Respectfully submitted,

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Service of the within and receipt of a copy thereof is hereby admitted this.....day of September, A.D. 1974.

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Supreme Court, U. S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1974

No. 73-5772

ANTHONY PASQUALE FARETTA, *Petitioner*,

vs.

STATE OF CALIFORNIA, *Respondent*.

On Writ of Certiorari to the California Court of Appeal Second Appellate District

BRIEF FOR AMICUS CURIAE JOHN E. THORNE

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CONSENT

The undersigned, John E. Thorne, is a member of the Bar of the State of California and a member of the Bar before this Honorable Supreme Court of the United States. As such I hereby represent, under penalty of perjury, that I have permission from the attorney for Petitioner and the attorney for Respondent to file this Amicus Brief.

OPENING STATEMENT

It is believed that to simply repeat the language of Petitioner's Opening Brief under the sections entitled

"Opinions Below", "Jurisdiction", "Constitutional and Statutory Provisions Involved", "Question Presented", and "Statement" would be redundant and a waste of the Court's time. Therefore those sections from Petitioner's brief are hereby adopted in their entirety and incorporated herein by reference. This brief will be limited to a presentation of a summary of the argument and the argument itself.

SUMMARY OF ARGUMENT

I

> "If I'm going to be railroaded to the gas chamber at least let me be the engineer."—Ruchell Magee

The above quote from Mr. Ruchell Magee, a Defendant presently awaiting trial in California, touches the very heart of the first portion of the argument in this brief, namely whether or not each of us in this country has the right to defend ourselves when the rest of the people have brought a charge against us in a criminal proceeding. Involved is the interpretation of language found in the Sixth Amendment to the Constitution of the United States giving those accused in criminal prosecutions the right ". . . to have the assistance of counsel for his defense." The due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution, as well as Article I, Section 13 of the California Constitution, and California Penal Code Sections 686,

859, and 987 are also involved, the California Constitution sections and the Penal Code sections being similar in intent to the Sixth Amendment of the United States Constitution.

The language interpretation question asks whether the Constitution in giving us the right to ". . . assistance of counsel . . ." carries with it the right to reject assistance of counsel and defend ourselves. The first part of the Argument answers this question affirmatively, suggesting that if the word freedom is a meaningful word in this country, the concept it carries must include the right to act as our own defender when we are accused of criminal activity.

II

The second part of the argument deals with the question of an indigent's right to name his or her own counsel, and to have that person appointed by the Court on two conditions. These conditions are the same faced by any person of means, namely that the attorney is willing to accept the case, and secondly willing to accept the fee the Court will authorize.

In the second portion of the argument the basic thrust is as follows:

1. Under the law, Petitioner, as an indigent, is entitled to have the Court appoint counsel to represent him.

2. To be represented by counsel means that a true attorney-client relationship must exist.

3. An attorney-client relationship exists only when the client has confidence in his attorney and thus is

psychologically capable of full cooperation with that attorney.

4. If there is no attorney-client relationship, a Defendant is not in fact represented by counsel.

5. If the Court appoints an attorney for a Defendant in whom the Defendant has no confidence, said Defendant is not represented by counsel.

6. Two conditions are proper to be imposed on the selection of counsel by Petitioner, namely that any attorney selected is willing to take the case and has the time therefore, and secondly that said attorney selected by Petitioner is willing to accept the fee the Court will pay for such representation.

As can be seen from the foregoing, the basic thrust of second portion of the argument suggests that our law gives an indigent the right to have counsel appointed by the Court, but in fact there is no counsel appointed unless the Defendant has confidence in that person, for *psychologically* a Defendant lacking confidence in his or her attorney is unable to relate and open up fully in the preparation of a defense, and would be a poor witness because of this lack of confidence.

ARGUMENT

I

As lawyers and judges we often think that the answer to a legal question can be found only by bringing together many time honored and well reasoned decisions from prior cases, augmenting these with citations to various code sections, and with all being presented in wise and lengthy briefs. It is respectfully suggested that the answer to the question of whether or not we should be allowed to defend ourselves when we are charged with criminal conduct, is an answer which should be found in the simplest of logic.

Even as we have a right to vote, we have a corresponding right *not* to vote. We suggest that any lawsuit brought to force a citizen of the United States into the polling place would be summarily dismissed. By analogy, when our Constitution gives us the right "to assistance of counsel" doesn't it also give us the right to reject counsel and protect and defend ourselves? We believe the answer to this question must be yes, unless we wish to cut into our freedoms even more. If the right to counsel does not carry with it the equal right not to have counsel, the words "right to counsel" should be changed to "*have* to have counsel"—dictatorship at its best.

The vast majority of cases raising the question presented in this case arise from guilty verdicts where the Defendant was represented by counsel. Could these Defendants have fared worse had they been allowed to defend themselves? We suggest not, and that in fact the only change with a *pro se* appearance, might have been to the advantage of the Defendant—an acquittal. We will never know if those Defendants who were acquitted when represented by counsel would have had the same result had they appeared *pro se*.

Too often we lawyers are blinded by our own ego, suggesting that victory comes because of the "bril-

liant work of the attorney". Perhaps we should analyze the drive of some of us who urge that Defendants must be represented by attorneys. More and more we see publications urging individuals to represent themselves in Court so as save legal costs, and more and more we see the citizens of this country going into Court unrepresented in civil actions. Are we attorneys afraid of the dollar loss?—Are we convinced it is a word game, and only lawyers can play such games?—And finally, does "concern for the Defendant receiving a fair trial" mean that every case must end in acquittal? A criminal trial should not be a word game, it should not be conducted so that a lawyer can make money, and a fair trial doesn't necessarily mean acquittal. If it is argued that the rules for the conduct of a trial are too complex for the laymen to understand, perhaps we should be looking to simplify the rules rather than to force an alleged expert on the Defendant who wishes to appear *pro se*.

Often as we read decisions where the Court struggled with Constitutional issues, we find the question coming up as to what the framers of that Constitution meant. We suggest that a healthy view of the Constitution indicates it to be a document outlining a logical approach to our inter-personal relationships. But to look back and try to determine what some human beings of years and years ago meant when they wrote that document seems to make little sense. We constantly tell ourselves that we are brighter than those who have gone before, and more intelligent because we have learned much more about ourselves,

our world, and our universe. (Such a position is highly debatable when we look around at the condition of life today on this little spaceship we call Earth.) If we are more intelligent, shouldn't the proper question be, how shall we interpret the Constitution for the needs of today's society? If so, logic would seem to indicate that members of the more intelligent society, in order to protect their freedom, should more readily interpret the Constitutional right to counsel as carrying with it the Constitutional right not to have counsel?

If the Constitutional guarantee of a right to assistance of counsel means that a Defendant must be so represented, it can clearly lead to a Catch-22 situation. The Court tells the indigent you must have an attorney and then proceeds to appoint one, following which the attorney, after fully investigating the entire situation, advises the Defendant that the best chance of acquittal comes by appearing *pro se*. Now the "assistance of counsel" recommending a *pro se* appearance bumps squarely against the Court's demand that the Defendant be represented. Such a situation might well have arisen in the instant case if the Public Defender appointed had given such advice to the Petitioner after the Court terminated what the Judge called "that privilege" to appear *pro se*. We suggest that this Catch-22 situation is eliminated by deciding that an appearance *pro se* is not a "privilege", but is in fact a Constitutionally guaranteed right.

The decisions involving the question of a Defendant's waiving the right to be represented by counsel

often speak in terms of that Defendant making "an intelligent and knowing waiver" of the right, or speak of the Defendant "knowing what he is doing". Such a determination simply keeps control in the hands of government, and again chips away at the freedoms we cherish. One Judge sitting in one courtroom can force legal representation on unwilling Defendants. We speak of the right of Appeal, but how can any Appellate Court make an intelligent determination of the Defendant's ability to appear *pro se* when the sole basis for making that judgment rests on words written on pieces of paper? If an individual Judge can spread a few words on the record and thus deprive a Defendant of appearing *pro se,* it is to place immense power in the hands of one of our employees, and we must never forget that every member of the Judicial, Executive, and Legislative branches of our government are employees of we the people. Employees should not take away employers freedoms and rights, including the right to appear *pro se.* Even as society cannot force us into the hands of a doctor when we fall and break a leg, society should not be allowed to force us into the hands of an attorney when that same society is seeking to take away our liberty by imprisonment.

It is a tough question to determine when one is so mentally deranged that they cannot comprehend what is going on around them and thus should be represented by counsel. If such a situation exists, it should undoubtedly be counsel's responsibility to see that there is no trial.

This Amicus respectfully suggests that only when there is overwhelming evidence of such mental derangement should a Defendant's right to appear *pro se* be taken away. It is the Defendant who will be imprisoned, and the Defendant should have the right to take his or her chance of staying out of prison by appearing without counsel.

II

This second portion of the argument urges that an indigent Defendant is entitled to select his or her own counsel to be appointed by the Court. Certainly there should be the two conditions that the attorney so selected be willing to take the case and be available, and secondly that such counsel be willing to accept the fee to be paid by the Court. In this portion of the brief we will be speaking of the "right to counsel", but by using such terms we are speaking of the situation in which the Defendant has decided in favor of representation.

The basic thrust of the argument goes to the question of whether or not counsel selected *solely* by the Court and in whom the Defendant has no confidence, is in fact "appointment of counsel".

The American Bar Association discusses the delicate nature of the relationship between attorney-client in its "Project on Standards for Criminal Justice-Standards Relating to the Prosecution Function and the Defense Function". This project had United States Supreme Court Chief Justice Warren E. Bur-

ger as its chairman from August, 1968, until August, 1969. In its draft proposal which has now been made final, the project report says:

> "Nothing is more fundamental to the lawyer-client relationship than the establishment of trust and *confidence*. Without it, the client may withhold important evidence that might have been obtained, that valuable defenses are neglected and, perhaps most significantly, the lawyer is not forwarned of evidence which will be presented by the prosecution. It is to encourage candor and full disclosures that the obligation of confidentiality which surrounds the lawyer-client relation has been erected." (Emphasis added). (Project draft, p. 201).

At another point, it is stated:

> "At whatever stage a lawyer is called into a criminal case, he encounters problems unlike those of his counterpart in an ordinary civil case. Like a person who has been struck down in the street by a hit-and-run car, the person who is suddenly arrested or indicted may have 'shock' reactions which block communication with those who are trying to aid him. The inexperienced, illiterate or unsophisticated defendant may be unable to grasp the nature of his predicament or the relevance of certain facts which he ought to relate to his lawyer. In addition, there are often psychological barriers to revealing information essential to the conduct of an effective defense. The accused may be frightened and apprehensive or hostile and uncooperative. Even with sophisticated clients these barriers exist. The lawyer must recognize these problems and deal patiently and persistently with them.
>
> *This is often true even where an affluent and sophisticated person selects his own lawyer and is even more true when the accused must depend upon counsel selected for him either by the Court or within the operation of a public defender system.* At some levels, an accused tends to view with suspicion any lawyer whose services are provided by the Court or public defender office; he may view such a lawyer as part of the official structure and not as an advocate of his cause." (Emphasis added). (Project Report p. 197).

The State Bar of California through its Committee on Continuing Education of the Bar has pointed to the same problem of lack of representation when there is lack of communication. In C.E.B. book "California Criminal Law Practice", we find the attorney being advised, *"if you are unable to communicate with him (the defendant), you will be unable to represent him properly."* (p. 110) (Emphasis added).

In a recent decision from the California Supreme Court (*Magee v. Superior Court,* 8 Cal.3d 949) the Court dealt with the question of a client's confidence in his counsel. In that case the Trial Judge had based his refusal to allow the association of Mr. Ramsay Clark, former United States Attorney General, on the grounds that Mr. Clark was not personally known to the Court, did not enjoy the Court's personal confidence, and was not known by the Court to be qualified. The Supreme Court of California said that such a position could not be justified, stating:

> "Whether or not the court is personally acquainted with the attorney to be associated, or whether or not that attorney enjoys the confidence of the court, are considerations wholly irrelevant to the constitutional issues confronting the trial court. *It is the defendant's confidence which is at stake, not that of the court.* The proper concern of the court is, in terms of the principle expressed in *Crovedi,* whether the defendant's desire to be represented by a particular retained attorney should be made to yield because it 'will result . . . in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.'" (*Crovedi* in the quotation refers to *People v. Crovedi,* 65 Cal. 2d 199). (Emphasis added).

Thus, the Courts, the American Bar Association, and the State Bar of California have all emphasized the need to have a true attorney-client relationship where communication can occur unimpeded between the attorney and the client.

Attached as exhibits to this brief are the declarations under penalty of perjury of three outstanding psychiatrists, Dr. Thomas Gonda, head of Stanford Hospital, Stanford University, California; Dr. Harvey Pirofsky, Professor of Psychiatry of Stanford Medical School and for many years on the staff of Agnews State Hospital, California; and Dr. Phillip Shapiro an outstanding psychiatrist practicing privately in San Francisco, California. These clearly establish that from a factual standpoint, the indigent Defendant will be unable to communicate with an attorney in whom he or she has no confidence, and that

the only way to secure this confidence is to allow the indigent to select his or her own counsel.

The next question is one of the Equal Protection of the Law as established by the Constitution. We know that the non-indigent can retain any lawyer desired under two conditions: (1) the attorney must be willing to take the case; and (2) the fee arrangement must be satisfactory to both attorney and client. For equal protection, we respectfully suggest that the indigent should have the same right. He should be able to select any attorney desired, as long as the attorney is willing to take the case and is willing to accept the fee to be paid by the government. In the case of *Griffen v. Illinois* (1955) 351 U.S. 12, the Court said:

> "Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand equal before the bar of justice in every American Court'."

The California Supreme Court in the case of *In Re Williams,* 1 Cal.3d 168, faced the question of a public defender not being knowledgeable as to the law and failing to advise the client with regard to a particular defense. The Court cited the Sixth Amendment and the Fourteenth Amendment of the United States Constitution to establish that the accused is entitled to counsel and then went on to say:

> "The logical corollary of this right is the right of indigents to have *effective* counsel appointed by the Court at state expense." (Emphasis added) (p. 174).

Recognition of the fact that counsel vary in their abilities is to recognize the simple fact of life that in any profession or occupation the abilities of those individuals who engage in the same do vary. Nothing guarantees to the wealthy Defendant that the counsel he or she selects will be the most competent, but under our system the fact of wealth does give that individual the right to select any counsel so desired, again assuming that the selected attorney will accept the case and the fee arrangement can be worked out. Again, to have the effective protection of the Equal Protection Clause of our Constitution, the indigent should have the same right. Nothing will guarantee to the indigent that his or her selection will be the most competent and effective counsel, but at least the indigent will then be on par with the wealthy, and most certainly will come closer to the ideal situation in which the client has confidence in the attorney, and thus can best relate to that attorney and properly prepare his or her defense.

CONCLUSION

In conclusion, this Amicus respectfully suggests, in paraphrasing the previously cited statement of Ruchell Magee, if we are to put a Defendant on a train which could lead to imprisonment, the Defendant should at least be allowed to be his or her own engineer. In other words, we urge this Court to uphold the right of a Defendant to the assistance of counsel, *and* the corollary right of appearing *pro se*.

We further urge the Court to consider the right of an indigent to select his or her own counsel. If there is question as to the psychological effect of having counsel in whom a Defendant has no confidence, we urge the Court to direct that a hearing be held so that medical evidence may be introduced, evidence which we believe will lead to the singular conclusion that counsel in whom a Defendant has no confidence means no counsel at all.

Respectfully submitted this 1st day of August, 1974.

JOHN E. THORNE,
Appearing Amicus Curiae.

(Exhibits Follow)

Exhibits

Exhibit A

David Johnson
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Louis N. Talamantez
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phone: (415) 454-1460
In Propria Persona

In the Superior Court of the State of California
In and For the County of Marin

No. 4094

The People of the State of California,
Plaintiff,

vs.

Stephen Mitchell Bingham, Hugo A. Pinell, John L. Spain, Louis N. Talamantez, Fleeta Drumco, David Johnson and Willie Tate,
Defendants.

DECLARATION UNDER PENALTY OF PERJURY OF DR. THOMAS A. GONDA

The undersigned hereby declares under penalty of perjury the following to be true:

Based on the following assumed facts, I will state an opinion. The assumed facts are as follows:

1) That an individual is charged with a violation of the Criminal Law of the State of California, and that conviction of such violation could carry as a penalty life imprisonment and/or the death penalty.

2) The person charged as a defendant is indigent and unable to hire an attorney of his or her choice.

3) The court appoints an attorney to represent the person charged, the attorney being selected by the court, not by the person charged, and over the objection of the person charged.

4) The person charged talks with the court appointed attorney and finds that he has no confidence in that attorney.

5) Assume also that the person charged has an attorney in whom he has confidence, and whom he would like appointed to represent him, and assume further that the attorney is willing to represent the individual if appointed to represent the person charged.

Based upon the foregoing assumed facts, the undersigned states that in his opinion the person charged could not in fact be represented by the Court appointed attorney who was selected over the objection of the person charged because the person charged could not enter into a true attorney-client relationship with that attorney. In my opinion, he very probably would be unable to have the necessary confidence in the attorney so as to deal openly and communicate

fully in the preparation of his defense, and further the person charged would be unable to be a good witness on the witness stand under questioning by such attorney because of a lack of confidence and the lack of the true attorney-client relationship.

Further, in my opinion, the way a true attorney-client relationship is very likely to be developed so that a person charged with a crime can have the necessary confidence so as to deal with the attorney and properly prepare any defense available to the person charged and so that said person can be a good witness for himself, the person charged must be able to select the attorney of his choice. By making such selection, the person charged with a crime can have confidence in the attorney, and rely upon the attorney to protect the interests of the person charged, and thus can psychiatrically and psychologically have the relationship required for an adequate and proper defense before a court or jury on charges brought against such person.

Attached hereto and incorporated herein by reference is factual material concerning the medical training, licensing, and specialization of the undersigned.

I hereby declare under penalty of perjury that the above is true, save and except those matters stated on information and belief and as to said matters, I believe them to be true.

Dated this 10th day of February, 1972.

/s/ Thomas A. Gonda
Thomas A. Gonda

Exhibit B

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In the Superior Court of the State of California
In and For the County of Marin

No. 4094

The People of the State of California,
Plaintiff,

vs.

Stephen Mitchell Bingham, Hugo A. Pinell, John L. Spain, Louis N. Talamantez, Fleeta Drumeo, David Johnson and Willie Tate,
Defendants.

DECLARATION UNDER PENALTY OF PERJURY OF DR. HARVEY PIROFSKY

The undersigned hereby declares under penalty of perjury the following to be true:

Based on the following assumed facts, I will state an opinion. The assumed facts are as follows:

1) That an individual is charged with a violation of the Criminal Law of the State of California, and that conviction of such violation could carry as a penalty life imprisonment and/or the death penalty.

2) The person charged as a defendant is indigent and unable to hire an attorney of his or her choice.

3) The court appoints an attorney to represent the person charged, the attorney being selected by the court, not by the person charged, and over the objection of the person charged.

4) The person charged talks with the court appointed attorney and finds that he has no confidence in that attorney.

5) Assume also that the person charged has an attorney in whom he has confidence, and whom he would like appointed to represent him, and assume further that the attorney is willing to represent the individual if appointed to represent the person charged.

Based upon the foregoing assumed facts, the undersigned states that in his opinion the person charged could not in fact be represented by the court appointed attorney who was selected over the objection of the person charged because the person charged could not enter into a true attorney-client relationship with that attorney. In my opinion, he would be unable to have the necessary confidence in the attorney so as to deal openly and communicate fully in the preparation of his defense, and further the person charged would be unable to be a good witness on the

witness stand under questioning by such attorney because of a lack of confidence and the lack of the true attorney-client relationship.

Further, in my opinion, the only way a true attorney-client relationship can be developed so that a person charged with a crime can have the necessary confidence so as to deal with the attorney and properly prepare any defense available to the person charged and so that said person can be a good witness for himself, the person charged must be able to select the attorney of his choice. By making such selection, the person charged with a crime can have confidence in the attorney, and rely upon the attorney to protect the interests of the person charged, and thus can psychiatrically and psychologically have the relationship required for an adequate and proper defense before a court or jury on charges brought against such person.

Attached hereto and incorporated herein by reference is factual material concerning the medical training, licensing, and specialization of the undersigned.

I hereby declare under penalty of perjury that the above is true, save and except those matters stated on information and belief and as to said matters, I believe them to be true.

Dated this 30th day of December, 1971.

/s/ Dr. Harvey Pirofsky
Dr. Harvey Pirofsky

Exhibit C

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In the Superior Court of the State of California
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Plaintiff,

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Stephen Mitchell Bingham, Hugo A. Pinell, John L. Spain, Louis N. Talamantez, Fleeta Drumco, David Johnson and Willie Tate,
Defendants.

DECLARATION UNDER PENALTY OF PERJURY OF DR. PHILLIP SHAPIRO

The undersigned hereby declares under penalty of perjury the following to be true:

Based on the following assumed facts, I will state an opinion. The assumed facts are as follows:

1) That an individual is charged with a violation of the Criminal Law of the State of California, and that conviction of such violation could carry as a penalty life imprisonment and/or the death penalty.

2) The person charged as a defendant is indigent and unable to hire an attorney of his or her choice.

3) The court appoints an attorney to represent the person charged, the attorney being selected by the court, not by the person charged, and over the objection of the person charged.

4) The person charged talks with the court appointed attorney and finds that he has no confidence in that attorney.

5) Assume also that the person charged has an attorney in whom he has confidence, and whom he would like appointed to represent him, and assume further that the attorney is willing to represent the individual if appointed to represent the person charged.

Based upon the foregoing assumed facts, the undersigned states that in his opinion the person charged could not in fact be represented by the court appointed attorney who was selected over the objection of the person charged because the person charged could not enter into a true attorney-client relationship with that attorney. In my opinion, he would be unable to have the necessary confidence in the attorney so as to deal openly and communicate fully in the

preparation of his defense, and further the person charged would be unable to be a good witness on the witness stand under questioning by such attorney because of a lack of confidence and the lack of the true attorney-client relationship.

Further, in my opinion, the only way a true attorney-client relationship can be developed so that a person charged with a crime can have the necessary confidence so as to deal with the attorney and properly prepare any defense available to the person charged and so that said person can be a good witness for himself, the person charged must be able to select the attorney of his choice. By making such selection, the person charged with a crime can have confidence in the attorney, and rely upon the attorney to protect the interests of the person charged, and thus can pyschiatrically and psychologically have the relationship required for an adequate and proper defense before a court or jury on charges brought against such person.

Attached hereto and incorporated herein by reference is factual material concerning the medical training, licensing, and specialization of the undersigned.

I hereby declare under penalty of perjury that the above is true, save and except those matters stated on information and belief and as to said matters, I believe them to be true.

Dated this 14th day of February, 1972.

/s/ Phillip Shapiro, M.D.

Phillip Shapiro, M.D.

Supreme Court, U. S.
FILED
OCT 31 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-5772

ANTHONY PASQUALL FARETTA,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT

PETITIONER'S REPLY BRIEF

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United States v. Plattner, 330 F. 2d 271 ..... 4, 6

Other Authorities:

B. Schwartz, The Bill of Rights: A Documentary History 265, 323, 342, 377 (1971) 2

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STATE OF CALIFORNIA,

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ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT

PETITIONER'S REPLY BRIEF

Petitioner replies very briefly to certain points made in Respondent's Brief:

1. Respondent dwells at considerable length upon the English common-law experience (see Resp. Brief, at 17-25) but reaches no material conclusion at odds with Petitioner. The parties are in agreement that prior to 1836, persons accused of felonies did not enjoy a right to counsel and, therefore, self-representation was common. See Pet. Brief, at 33; Resp. Brief at 17-25.

2. The parties are in similar agreement as to the early American history. At the time of the adoption of

the Constitution, at least four states – Pennsylvania, Vermont, Massachusetts, and New Hampshire – expressly guaranteed the right of self-representation.[1] Delaware and Georgia soon adopted like provisions.[2] While other early charters did not expressly guarantee the right of self-representation (except to guarantee the right of confrontation, which Petitioner contends embraces the right of self-representation), Respondent has found nothing in the historical materials which would specifically evidence a deliberate decision by the framers of the various state charters to exclude self-representation.

3. With respect to history, then, the parties differ only in the inferences which they draw. Respondent argues that since some early charters expressly protected the right of self-representation, the failure of the framers to do so in the federal Constitution indicates a conscious decision to exclude it:

> The framers in adopting the Bill of Rights, did so with their eyes open. They must have been familiar with the states which had constitutions giving a state "right" to self-representation and they must have been familiar with the Judiciary Act which they were debating at the same time as the Bill of Rights which also provided for self-representation. Yet, in spite of this awareness, the framers of the Bill of Rights specifically mentioned only the right to counsel. The omission of any mention of the right to self-representation must have been purposeful. (Resp. Brief, at 30).

[1] 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 265, 323, 342, 377 (1971). Petitioner's opening brief inadvertently omitted Massachusetts from its enumeration of the states which guaranteed the right of self-representation, but Respondent correctly identifies that state as having such a provision. See Resp. Brief, at 27.

[2] See Pet. Brief, at 36 & n.25 26.

Yet Respondent concedes, as it must, that "the debates in Congress as to both the Judiciary Act and the Bill of Rights are bereft of discussion on this point". *Id.* Indeed, there is literally *nothing* in the pertinent historical materials to suggest, as Respondent urges, a conscious decision by the framers to empower the new government to *compel* a defendant to accept representation by counsel. Nor does history provide the slightest grounds upon which to speculate that the framers, had they debated the issue, might have sought to deny the right of self-representation. Significantly, Respondent has not cited a single instance, nor do we know of one, in which a defendant of that period was compelled to accept counsel and denied the right of self-representation.

In those circumstances, the prevalence of self-representation compels the opposite conclusion. At a time when the right of self-representation had simply never been threatened, and when in the perceptions of the period the principal issue was the securing of an additional right – a right to representation by counsel – history provides no warrant for a conclusion that the right of self-representation was deliberately excluded from the Constitution.

4. Moreover, we do not agree that, as Respondent urges, the Constitution is silent on the question. Rather, we think that the Sixth Amendment, in expressly guaranteeing "the accused" the right "to be confronted with witnesses against him" and "to have compulsory process for obtaining witnesses in his favor", provides

ample textual support for the right of self-representation.[3] Respondent argues in effect that the rights of confrontation and cross-examination are fully satisfied if exercised for the defendant by counsel. See Resp. Brief, at 41-42. This argument might, however, have been as appropriately addressed to the seeming absence of an explicit right to be present at one's trial; yet this Court has never hesitated to find that right implicit in the Confrontation Clause of the Sixth Amendment. *See, e.g., Illinois v. Allen,* 397 U.S. 337 (1970). If Respondent were correct in contending that the rights granted the defendant could be exercised by him through an attorney, then the Confrontation Clause would be an inappropriate foundation for the right to be present. The answer, of course, is that the Sixth Amendment entitles defendant to be present because the right of confrontation is *his* right to exercise:

> [I]t will be in his power, if present, to give advice or suggestions *or even to supersede his lawyers altogether and conduct the trial himself. (Snyder v. Massachusetts,* 291 U.S. 97, 106 (1934), emphasis added).

5. Respondent incorrectly attributes to Petitioner the argument that the Constitution requires the trial court to assist a defendant who represents himself and to appoint an advisory or standby counsel. Resp. Brief, at 48-49. We have very clearly stated that a trial judge is obligated to do neither. See Pet. Brief, at 54-55. Of

[3] Citation of the Confrontation and Compulsory Process Clauses is not to quarrel with those, the Second Circuit among them, who view the right of self-representation also included within the right-to-counsel clause of the Sixth Amendment. *See, e.g., United States v. Plattner,* 330 F.2d 271, 274 (2d. Cir. 1964).

course, the trial judge *may* assist the defendant; and many trial judges will. See Pet. Brief, at 55. Likewise, the trial judge *may* appoint a standby counsel. See Pet. Brief, at 55-56. That course has been generally endorsed by courts and commentators alike (see authorities cited at *id.* 56), including the American Bar Association Project on Standards for Criminal Justice. California law unquestionably permits a trial judge to do so. *See, e.g., People v. Carter,* 66 Cal.2d 666, 671, 58 Cal.Rptr.614, 427 P.2d 214 (1967); *People v. Mattson,* 51 Cal.2d 777, 794, 336 P.2d 937 (1959).

6. Finally, Respondent urges that in any event denial of the right of self-representation should be measured by a harmless error test. Respondent incorrectly contends that the Second Circuit has endorsed this view.[4] That court has unequivocally held to the

[4] *United States v. Abbamonte,* 348 F.2d 700 (2d Cir. 1965), is cited by Respondent as holding that denial of the right of self-representation can be harmless error; that is erroneous. In that case, the defendant (who had in various ways engaged in conduct which appeared to be dilatory) sought a continuance on the day of trial for the ostensible purpose of obtaining a new lawyer. Although the defendant, following the trial court's denial of the continuance, purported to discharge his counsel, the Court of Appeals held that the trial court was entitled to view his conduct as involving an attempt to obtain a continuance and that in fact the defendant did not desire to proceed without counsel. 348 F.2d, at 704. The Court of Appeals simply held, then, that on the facts presented the case did not involve a genuine desire and demand for self-representation. In passing, the Court of Appeals indicated that its conclusion was reinforced by the excellent representation afforded by counsel and the defendant's evident satisfaction with it.

contrary. *United States v. Plattner, supra,* note 3, at 273.

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